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No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing & Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether, in determining BWW's eligibility for moving expenses under the Uniform Relocation Act, the Department of Housing and Urban Development (HUD) and the courts below (including the Second Circuit) are bound, under the doctrine of collateral estoppel, by the income tax decision of the United States Tax Court (affirmed by the Second Circuit) which held that in applying the *tax benefit rule* and in determining BWW's eligibility for income tax deductions for moving expenses, no part of a state condemnation award constituted a reimbursement of BWW's moving expenses.

2. Whether a state condemnation award for the pre-move in-place value of BWW's fixtures had "substantially the same purpose and effect" as a payment of moving expenses under the Uniform Relocation Act.

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UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing & Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Buffalo Wire Works Company, Inc. (hereinafter BWW) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 12, 1988.

Opinion Below

The Court of Appeals entered a judgment without opinion, stating "It is now ordered that the judgment appealed from be and hereby is affirmed for substantially the reasons set forth in Judge Curtin's opinion". The opinion of the District Court for the Western District of New York, not yet reported, and the judgment of the Court of Appeals appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered April 12, 1988. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

United States Code, Title 42:

§4622, which governs in federally assisted urban renewal programs, provides that whenever the acquisition of real property for a program or project will result in the displacement of any person on or after the effective date of this act, the head of the Federal agency shall make a payment to such person, upon proper application, for

> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
>
> (2) actual direct losses of tangible personal property in moving or discontinuing a business or farm operation, but not more than the reasonable expenses that would have been required to relocate such property; and
>
> (3) actual reasonable expenses in searching for a replacement business or farm.

§4631(b) provides that no relocation payment shall be made

> "if the displaced person receives a payment required by the State law of eminent domain which is determined by such Federal agency head to have substantially the same purpose and effect as such payment under" the Uniform Relocation Act.

Statement of the Case

On February 15, 1972, as part of a federally assisted urban renewal program, governed by the Uniform Relocation Act of 1970, BWW's manufacturing plant was acquired by the City of Buffalo in a condemnation proceeding litigated in the Supreme Court of the State of New York. BWW moved from its old location to a new location in the City of Buffalo beginning March 15, 1972.

The judgment in the condemnation proceeding, entered on February 1, 1972, awarded BWW $1,115,744.87 which represented the total value of the BWW property taken by the City. The state court judge in the eminent domain proceeding arrived at this total by adding the following three amounts:

Value of Land	$195,000.00
Value of Building	440,000.00
Value of Fixtures not to exceed costs of moving	480,744.87

The last figure ($480,744.87) was determined by the following methodology:

When BWW's plant was condemned for urban renewal, BWW had two options under New York condemnation law with respect to its fixtures (which consisted primarily of heavy machinery). First, it could have abandoned the fixtures and received an award of $1,276,663 which represented their in-place value. Secondly, it could retain the fixtures and receive the lower of

(a) the in-place value ($1,276,663) minus salvage value ($237,665)—*i.e.*, $976,813,

or

(b) the estimated cost of moving the fixtures to another plant—*i.e.*, $480,744.87 (a figure determined by reference to a proposed but later abandoned move to West Seneca, New York).

Under either option, what BWW was entitled to receive from the City represented value which the fixtures had at its old plant, *i.e.,* BWW would have received an amount inclusive of $480,744.87 *whether or not it chose to relocate.* On the other hand, under no circumstances was the City under New York condemnation law, required to reimburse BWW for the actual cost of moving its property to its new plant.

BWW chose the second option and received a total award of $1,115,744.87, which included the $480,744.87 value of its fixtures at its old plant.

To acquire its new plant in Buffalo, BWW expended $62,385 more than the net award in condemnation. *In addition thereto,* BWW expended $295,773.24 in actual "moving costs" to its new plant. It is for these *additional sums,* expended as relocation payments, that BWW seeks reimbursement under the Uniform Relocation Act.

BWW's claim was rejected by the Department of Housing and Urban Development (HUD), and, on appeal by the District Court for the Western District of New York, and, on further appeal, by the Court of Appeals for the Second Circuit. The reason for the rejection of the claim was the same at all three levels, *i.e.,* the mistaken view that in the state condemnation proceeding BWW had been paid the equivalent of moving costs under the Uniform Relocation Act. This mistaken view was based on the fact that the condemnation award for retained fixtures was limited to the estimated costs of moving them if that amount was lower than the in-place-less-salvage value at the old plant, despite the fact that the nature, purpose, and effect of the award was not to reimburse BWW for moving to a new plant but to compensate BWW for value at the old plant.

Precisely this same mistaken view of the state condemnation award had been previously taken by the

Internal Revenue Service when it contended that under the "tax benefit rule" BWW was required to include in income amounts received in the condemnation award as a reimbursement of actual moving expenses previously deducted. In the income tax proceeding this mistaken view of the state condemnation award was rejected by the United States Tax Court and, on appeal, by the Court of Appeals for the Second Circuit, which had stated in its unpublished decision in *Buffalo Wire Works v. Commissioner*, 659 F.2d 1058 (1981):

> The Commissioner contends that the taxpayer should have included as ordinary income the recovery of a sum measured by moving expenses rather than as an amount paid for loss in value of the taxpayer's property and therefore entitled to non-recognition as gain within the meaning of §1033 of the Internal Revenue Code of 1954, 26 U.S.C. §1033. After a careful examination of the record, briefs and oral argument, we disagree, substantially for the reasons stated by Judge Goffe in his opinion. *The $430,162 awarded the taxpayer by the City of Buffalo was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash. E.R. Hitchcock Co. v. United States*, 514 F.2d 484, 487 (2d Cir. 1975). Under New York law this *method of valuation* may be adopted where it is smaller than the amount which would be arrived at by deducting salvage value from the present value of the fixtures in place, which in this case would have resulted in an award of $976,813. *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1968). (Emphasis added.)

Nevertheless, despite controlling principles of *collateral estoppel*, the mistaken view of the state condemnation award has been resurrected in the instant proceeding, by HUD, by the District Court, and most unfortunately (and without opinion) by the Second Circuit, the same court which had rejected the mistaken view in the income tax proceeding.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of this Court, decisions of other Circuits, and decisions of the Second Circuit itself, on the binding effect, under *collateral estoppel*, of a prior court decision which expressly decided, and turned on, the same crucial underlying issue involved in later litigation between the same parties.

The ultimate issue with respect to moving expenses under the federal Uniform Relocation Act is the propriety of the district court's holding that the $480,744.87 portion of the award in the state condemnation proceeding for the fixture element had, under 42 U.S.C. sec. 4631(b), "substantially the same purpose and effect" as would relocation payments under the Relocation Act for "actual moving" expenses of BWW to its new location.

The crucial issue underlying this ultimate issue is the proper characterization of the nature and effect, under New York law, of the order of the Supreme Court in the state condemnation proceeding. That crucial underlying issue had already been decided by the United States Tax Court in *Buffalo Wire Works Co., Inc. v. Commissioner of Internal Revenue*, 74 T.C. 925 (1980), a decision which was affirmed by the Second Circuit in an unpublished opinion, 659 F.2d 1058 (1981).

Despite controlling precedents on the doctrine of *collateral estoppel*, in this Court, other Circuit Courts, and the Second Circuit itself, the decision of the Tax Court, affirmed by the Second Circuit, was not accorded its proper binding effect by HUD, the District Court, or the Second Circuit's decision below.

(a) The HUD Decision

The rationale of the HUD decision is clearly stated in its opinion:

> *MOVING COSTS INCLUDED IN CONDEMNATION AWARD:*
>
> In a decision dated December 1, 1971, New York State Supreme Court Judge Alfred M. Kramer made his final determination in this matter. On Page 12 of said Memorandum, the Judge stated: "The matter before this Court is to determine the costs of disassembling, trucking, reassembling and relocation generally as per the memorandum of this Court dated December 10, 1969 and as per order of this Court dated December 24, 1969."
>
> The Judge stated "Judgment is directed herein in favor of Buffalo Wire Works, Inc., against the City of Buffalo for the sum of $1,115,744.87." The sum was tabulated as follows:

Value of Land	$ 195,000.00
Value of Buildings	440,000.00
Moving, Etc.	480,744.87
	$1,115,744.87

> Value of the machinery (fixtures) in place was determined to be $976,813. However, because the estimated moving and reinstallation costs were found to be less than the value of the machinery in place, the Court awarded the claimant the moving costs and not the value of the machinery in place. As stated previously, said moving costs allowed by the Court were $480,744.87.
>
> * * *
>
> *SUMMARY*
>
> Based upon the above and other material, we have determined that the claimant was paid for his moving expense. Therefore, he did in fact receive a relocation payment that was covered by the sum of $480,744.87.

> The claimant has maintained that he has never received a relocation payment. Whatever he considers the sum of $480,744.87 to represent is not clear. What is clear is that the claimant was paid for his moving costs, and that Federal Law prohibits duplicate payments (Uniform Act-P.L. 91-646, Title II, Section 211(b)).

(b) The District Court Decision

Similarly, the district court view is clearly stated:

> There is certainly no question that the award was *for* moving expenses, as reflected by the itemized description of the award above (Emphasis in the original.)

(c) The Second Circuit Decision

> The Second Circuit, without opinion, affirmed the District Court, stating: "It is now ordered that the judgment appealed from be and hereby is affirmed for substantially the reasons set forth in Judge Curtin's opinion."

The position of BWW is that the above-stated conclusions are precluded by *collateral estoppel.*

The Second Circuit Court has most recently stated the governing principles of collateral estoppel:

> [O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Allen v. McCurry,* 449 U.S. 90, 94 (1980) (citing *Montana v. United States,* 440 U.S. 147, 153 (1979)). Collateral estoppel, or issue preclusion, properly is applied to bar relitigation of claims when: (1) the issues presented "are in substance the same as those resolved" in the prior litigation; (2) no "controlling facts or legal principles have changed significantly" since the prior proceeding; and (3) no

special circumstances warrant an exception to the normal rules of preclusion. *Montana v. United States*, 440 U.S. 147, 155 (1979).

Although the prior proceeding involved commodity rates rather than terminal service charges, the same issue raised by NFTB in the instant petition, *i.e.*, the proper meaning of a single-line rates, was resolved adversely to petition by the ICC and the Court of Appeals for the District of Columbia Circuit. *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1189-90 (2d Cir. 1987).

In our case, the same issue raised by the United States (HUD), *i.e., the proper characterization of the nature and effect, under New York law, of the order of the New York State Supreme Court in the condemnation proceeding,* was resolved adversely to the United States (Commissioner of Internal Revenue) by the United States Tax Court and by the Second Circuit itself.

(a) The Opinion of the U.S. Tax Court

In its recital of the facts and contentions of the parties, the Tax Court stated:

Petitioner claimed deductions for moving expenses which it incurred during the taxable years 1965 through 1972 in the following amounts:

Taxable Year	*Amount*
1965	$ 23,377.81
1966	11,863.57
1967	15,433.39
1968	14,387.62
1969	13,953.14
1970	-0-
1971	81,193.33
1972	257,842.52
	$418,051.38

* * *

In his statutory notice of deficiency, the Commissioner determined that the amount of $418,052, which petitioner received as part of its condemnation award in 1972, constituted ordinary income to petitioner as a direct reimbursement of the moving expenses which had been incurred during and claimed as a deduction for the taxable years 1965 through 1972. The Commissioner determined further that petitioner received a net award of $430,162 as reimbursement for moving expenses, calculated as follows:

Award for moving expenses	$480,745
Portion allocable to legal, engineering, and appraisal expenses	(50,583)
Net award for moving expenses	$430,162

* * *

In summary, respondent has articulated three contentions:

(1) that $430,162 of the condemnation award constituted ordinary income to petitioner, part as reimbursement for moving expenses and part as excess reimbursement for moving expenses;

(2) that the moving expenses of petitioner for the taxable year 1972 are deductible only to the same extent that the condemnation award is includable as ordinary income to petitioner in that year; and

(3) that petitioner must restore to income in 1972 the amounts were deducted as moving expenses in the taxable years 1965 through 1971 because such amounts were recovered by petitioner through its condemnation award. *By placing respondent's contentions side-by-side, it can be seen that each of the three contentions is premised on the same crucial determination, namely that a portion of petitioner's condemnation award constituted reimbursement of moving expenses. Petitioner's sole contention is that no part of its condemnation award*

was received as reimbursement of moving expenses, but that the entire award (less refunded property tax and legal, engineering, and appraisal expenses) constitutes an amount realized upon the involuntary conversion of property into money. Thus, the basic issue to be decided in this case is whether the portion of the condemnation award which totaled $480,744.87 should be treated for purposes of Federal income taxation as reimbursement of moving expenses or as money into which property has been converted. (Emphasis added.)

After a lengthy review of the facts and law, the Court concluded:

> Considering the rule of *Golsen v. Commissioner, supra*, the opinion of the court of appeals in *E.R. Hitchcock Co. v. United States, supra*, and the facts of the instant case, we are compelled to hold that the portion of petitioner's condemnation award which was determined by reference to moving expenses constitutes an amount realized from the involuntary conversion of property into money *rather than reimbursement for moving expenses. Accordingly, we hold that no part of petitioner's condemnation award constitutes ordinary income to petitioner as reimbursement for moving expenses or as excess reimbursement for moving expenses. . . .* [Emphasis added]

The Court strongly reiterated this holding in rejecting the Commissioner's "tax benefit theory" which, at bottom, is precisely the double recovery theory espoused by HUD in this case:

> With respect to respondent's argument under the tax benefit rule, we would point out the requirement that a taxpayer must make a recovery of an item which generated a deduction in an earlier taxable year. See sec. 111; sec. 1.111-1(a), Income Tax Regs.; *Spitalny v. United States*, 430 F.2d 195 (9th Cir. 1970). Respondent correctly points out that petitioner

> claimed deductions for moving expenses in taxable years prior to 1972 and that such deductions resulted in a tax saving to petitioner. However, because of our holding that all of the condemnation award is properly categorized as an amount realized from the involuntary conversion of property into money, *no part of that condemnation award constitutes a recovery of prior moving expenses.* (Emphasis added.)

Finally, with respect to the Commissioner's "right of reimbursement" theory, the Court stated:

> We must reach a similar result with respect to respondent's argument that amounts expended for moving expenses during the taxable year 1972 were spent with a right to reimbursement. *No part of the condemnation award represents reimbursement of moving expenses.* (Emphasis added.)

(b) The Affirmance of the Tax Court by the Second Circuit.

In its order affirming the Tax Court in *BWW v. Commissioner,* 659 F.2d 1058 (1981), the Second Circuit stated:

> The Commissioner contends that the taxpayer should have included as ordinary income the recovery of a sum measured by moving expenses rather than as an amount paid for loss in value of the taxpayer's property and therefore entitled to non-recognition as gain within the meaning of §1033 of the Internal Revenue Code of 1954, 26 U.S.C. §1033. After a careful examination of the record, briefs and oral argument, we disagree, substantially for the reasons stated by Judge Goffe in his opinion. *The $430,162 awarded the taxpayer by the City of Buffalo was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash. E.R. Hitchcock Co. v. United States,* 514

> F.2d 484, 487 (2d Cir. 1975). Under New York law this *method of valuation* may be adopted where it is smaller than the amount which would be arrived at by deducting salvage value from the present value of the fixtures in place, which in this case would have resulted in an award of $976,813. *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1968). (Emphasis added.)

The decision of HUD in the instant case was completely silent with respect to collateral estoppel and the effect of the decisions of the Tax Court and the Second Circuit in *BWW v. Commissioner*. The district court rejected the claim of collateral estoppel on the ground that "the holding in *BWW* [*i.e.*, the tax case] is a narrow one not opposite to the issue before HUD." The opinion of the district court was as follows:

> *BWW* is only concerned with the tax identity of the money received by plaintiff for "Moving, etc." in its State condemnation award. For *federal tax purposes*, there is a categorical distinction, a difference in income, between payment received for an involuntary conversion of property into money, and payment received for moving expenses. But for purposes of the issue before HUD, that distinction is immaterial. There is no necessary incompatibility between the holding in *BWW* that plaintiff's payment was an involuntary conversion of property into money and HUD's finding that plaintiff's payment had substantially the same purpose or effect as a payment for actual reasonable moving expenses. Put simply, plaintiff may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money. (Emphasis in the original.)

The error of the district court lay in its failure to appreciate the proper function of the doctrine of collateral estoppel. Collateral estoppel deals with "issue

preclusion" vs. "claim preclusion." *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 376 n. 1 (1985). If a legal or factual issue was litigated and determined between the parties in a former proceeding, it cannot be relitigated in a later proceeding even though the later proceeding constitutes a different cause of action under a different statute, which involves different policy considerations from the statute involved in the first proceeding. As the Court observed in *Allen v. McCurry*, 449 U.S. 90, 95 (1980):

> Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153-154.

Section 27 of 1 Restatement (Second) of Judgments (1982) sets out the general rule of issue preclusion:

> When an issue of fact of law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

In *Frye v. United Steelworkers of America*, 767 F.2d 1216 (7 Cir. 1985), the appellant challenged the application of collateral estoppel on the ground that the former proceeding had been decided under a different statute involving different policies than the statute involved in the later proceeding. The Seventh Circuit responded:

> [Appellant's] first two arguments, based on the policy differences between the LMRDA and the LMRA, overlook an important aspect of collateral estoppel. Collateral estoppel is allowed to prevent the relitigation of any legal or factual issue that has been "actually litigated and determined by a valid and final judgment." 1 Restatement (Second) of Judgments @ 27 (1982), quoted in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 469 (7 Cir. 1982), cert. denied, 461 U.S. 958 (1983). An express finding of fact or finding of law in the earlier judgment is sufficient to give it preclusive effect, id., if that finding was necessary and essential in the earlier judgment. . . . Therefore, it is not the similarity between the types of litigation or actions involved but between the factual issues and their roles in the respective actions that is important. 767 F.2d at 1220.

The Second Circuit itself recognized and applied these same principles in *Wickam Contracting Co. v. Board of Education*, 715 F.2d 21 (2 Cir. 1983), where collateral estoppel was held to preclude relitigation of issues previously determined by the NLRB (and affirmed by the Second Circuit) in two unfair labor practice cases under 29 U.S.C. sec. 158(b)(1)(B) and (b)(4)(B), even though the later proceeding involved treble damages under the Sherman Antitrust Act (15 U.S.C. sec. 1). See also, *Allen v. McCurry*, 449 U.S. 90 (1980) (rejection by a state court of a motion to suppress evidence in a criminal trial as having been obtained through a violation of the defendant's constitutional rights collaterally stops defendant from relitigating the issue in a later federal court action under 42 U.S.C. sec. 1983).

In the *BWW* tax case, the determinative underlying issue was the nature and effect of the eminent domain award under state law. As this Court stated in *United*

States v. National Bank of Commerce, 472 U.S. 713, at 722:

> [I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property. *Aquilino v. United States*, 363 U.S. 509, 513 (1960), quoting *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940). See also *Sterling National Bank*, 494 F.2d at 921. This follows from the fact that the federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States v. Bess*, 357 U.S. 51, 55 (1958). And those consequences are "a matter left to federal law." *United States v. Rodgers*, 461 U.S., at 683.

Both the Tax Court and the Second Circuit determined that the "nature of the legal interest" effectuated by the eminent domain award under New York law was a payment to BWW for the existing value of the fixture element of its real property at BWW's old location and *not* a reimbursement of the separate and additional expenses paid by BWW to move its severed machinery to its new location. In light of these former decisions, the state court eminent domain award cannot conceivably be considered to have had "substantially the same purpose and effect" (28 U.S.C. sec. 4631(b)) as a payment of "actual reasonable expenses in moving" under 42 U.S.C. sec. 4622(a)(1).

It should be noted that in the district court HUD contended that an additional collateral estoppel requirement *i.e.*, identity of parties, had not been met. Neither the district court, nor the Second Circuit addressed this issue. It is BWW's position that the question of identity of parties is governed by this Court's decision in *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940). In that case, a coal producer attempted to

enjoin the Commissioner of Internal Revenue from collecting a tax on the sale of "bituminous coal" on the ground that the coal in question was not "bituminous." In a previous action the United States Court of Appeals had affirmed a decision by the Bituminous Coal Commission that the coal was "bituminous." This Court held that the judgment of the United States Court of Appeals in the former action was *res judicata* in the action against the Commissioner of Internal Revenue. In oft-quoted language this Court stated:

> Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R.I. & P. Ry. Co. v. Schendel,* 270 U.S. 611, 620, "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, ... and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell v. County of Sac,* 94 U.S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait v. Western Maryland Ry. Co.,* 289 U.S. 620. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. ... here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as

> the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait v. Western Maryland Ry. Co., supra.*

In our case it is unquestionable that "in the earlier litigation [the BWW tax case] the representative of the United States [the Commissioner of Internal Revenue] had authority to represent its interests in a final adjudication of the issue in controversy [whether the condemnation award constituted an award of moving expenses.]" Therefore, as *Sunshine Coal* makes clear, "that suit therefore bound the United States . . . and its subordinate officials."

2. The decision below raises, for the first time, the important question of the relationship between state condemnation law and the eligibility of a displaced person to receive moving expenses under the Uniform Relocation Act of 1970 (42 U.S.C. §4621 *et seq.*).

As this Court noted in *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Tel.*, 464 U.S. 30 (1983):

> The passage of the Relocation Act in 1970 ended a decade of close consideration of the problems faced by persons displaced by federal and federally funded projects. See Alexander v. United States Dept. of HUD, 441 US 39, 49, 60 L Ed 2d 28, 99 S Ct 1572 (1979). The principal sponsor of the bill, Senator Muskie, noted that over 50 federal programs resulted in condemnation proceedings and that the victims of such proceedings received widely varying treatment. "Nearly all federally assisted programs have differing, if not conflicting, provisions for helping those displaced. They range from no assistance in some cases to liberal benefits and protection in others." 115 Cong Rec 31533 (1969). In part, the Uniform Relocation Act was passed, as its name suggests, simply to ensure uniform treatment of persons displaced by condemnation.
>
> Another, equally important, purpose of the Act was to ensure that persons displaced by federal and federally funded programs would "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 USC §4621 [42 USCS §4621]. Under traditional concepts of eminent domain, a homeowner would receive only the market [464 US 37] value of his condemned house. HR Rep No. 91-1656, p 8 (1970). A tenant at will, residing or doing business at condemned premises, received nothing. Id., at 12. Yet both would incur significant, perhaps devastating, expenses in moving personal property.

> S Rep No. 91-448, pp 6-7 (1969); HR Rep No. 91-1656, supra, at 2-3. The Relocation Act was intended to alleviate the "disproportionate injuries" suffered by such person.

These salutary purposes of the Uniform Relocation Act have been thwarted in the present case because HUD and the courts below have failed to set forth any guidance with respect to, and have basically ignored, the condemnation law of the State of New York and its relationship to the Uniform Relocation Act. More specifically, at none of the three levels of decision is there a whisper as to *why* the New York formula for determining the compensation to be paid for the value added to BWW's old plant by its fixtures should be considered to have "substantially the same purpose and effect" as a payment for actual moving costs under the Relocation Act.

This refusal to face up to the challenge of a rationale mirrors the similar refusal, in connection with the doctrine of *collateral estoppel*, to explain how a payment could have substantially the same purpose and effect as a reimbursement for moving expenses and yet not be required to be included in BWW's income under the "tax benefit rule", as the Tax Court and the Second Circuit had previously held. As this Court held in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370, 383 (1983), the "tax benefit rule" requires an inclusion in income if a "later event is . . . fundamentally inconsistent with the premise on which the deduction was initially based." If, as the Tax Court and the Second Circuit had held, the state eminent domain award for BWW's fixtures was not "fundamentally inconsistent" with BWW's prior deduction for actual moving expenses, how could the same award be considered to have had

"substantially the same purpose and effect" as a payment of actual moving expenses under the Relocation Act?

In lieu of any attempted rationale, HUD's opinion merely concludes:

> "The claimant has maintained that he has never received a relocation payment. Whatever he considers the sum of $480,744.87 to represent is not clear. What is clear is that the claimant was paid for his moving costs, and that Federal Law prohibits duplicate payments (Uniform Act-P.L. 91-646, Title II, Section 211(b))."

The District Court's opinion was equally conclusory and bereft of rationale:

> "There is certainly no question that the award was *for* moving expenses, as reflected by the itemized description of the above award.' (Emphasis in the original.)

The Court of Appeals for the Second Circuit chose to avoid the issue completely, affirming without opinion, and stating in its judgment:

> "It is now ordered that the judgment appealed from be and hereby is affirmed for substantially the reasons set forth in Judge Curtin's opinion."

The consequences of all of the above abdication of responsibility in adjudication are twofold:

First, future displaced persons in federally assisted urban renewal programs are left with no guidance with respect to the relationship between judicially evolved state condemnation principles and the prohibition of duplicate Federal/State payments under 42 U.S.C. §4631(b).

Secondly, as a corollary of the first consequence, the two major purposes of the Uniform Relocation Act, as set forth by this Court *supra*, are thwarted, *i.e.*, the twin purposes of establishing uniform treatment of displaced persons and the elimination of "disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

It simply will not do to allow, as the courts below have done, the head of HUD to determine *without any articulation of standards*, that a particular payment under state condemnation law is the substantial equivalent of a payment for moving expenses under the Relocation Act. Such a view, espoused by the courts below, not only violates the *Chenery* doctrine that an agency must explain its decisions with some semblance of specificity (SEC v. Chenery Corp., 318 U.S. 80 [1947]) but it engenders the very disparity which the Relocation Act was designed to eliminate, since it permits HUD to roam at large, declaring one State's formula to be the equivalent of a payment of moving expenses, and another State's formula not to be such a payment, *all without any underlying rationale.*

The resulting lack of uniformity and potential for "disproportionate injury" is well illustrated in instant case.

Under New York law, BWW could have abandoned its fixtures and received their in-place value of $1,276,663. Instead, it chose to remain in business, retain its fixtures and relocate to a new plant—with the desirable concomitant effects to the economy, including the retention by its employees of their jobs. To do this, BWW had to pay $295,773.24, out-of-pocket, to move its equipment. None of this amount could be recouped from the City of Buffalo since New York law does not require

reimbursement of moving expenses. All that BWW received for the value added to realty by its fixtures was $480,744.87, which, when added to the salvage value of the fixtures ($237,665), gave BWW a total of $718,409.87. If it had received the $295,773.24 it claims under the Relocation Act, it would have received a total of $1,014,183.11, an amount somewhat close to what it would have received if it had abandoned its fixtures.

Thus, if the decision below is allowed to stand a displaced person in BWW's position who chooses to abandon its fixtures is in a substantially better position than one who chooses to relocate. This lack of uniformity and "disproportionate injury" to a displaced person who chooses to relocate and stay in business is precisely what the Relocation Act was designed to eliminate.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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July 8, 1988

Appendix "A"—Decision of the United States Court of Appeals for the Second Circuit (In This Case).

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CURTIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 12th day of April, one thousand nine hundred and eighty-eight.

Present:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
Circuit Judges.

BUFFALO WIRE WORKS COMPANY, INC.,
Plaintiff-Appellant,

against

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing and Urban Development, BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Defendants-Appellees.

No. 87-6280

United States Court of Appeals
Filed
APR 12 1988
Elaine B. Goldsmith, Clerk
Second Circuit

This appeal from a judgment of the United States District Court for the Western District of New York, John T. Curtin, *Chief Judge,* came on to be heard on the transcript of the record and was argued.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is affirmed for substantially the reasons set forth in Judge Curtin's opinion.

WM. H. TIMBERS
William H. Timbers, *U.S.C.J.*

GEORGE C. PRATT
George C. Pratt, *U.S.C.J.*

ROGER J. MINER
Roger J. Miner, *U.S.C.J.*

B.: This summary order will not be published (illegible) the Federal Reporter and Should not be (illegible)ted or otherwise relied upon in unrelated cases before this or any other court.

Appendix "B"—Decision of the United States District Court for the Western District of New York (In This Case).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BUFFALO WIRE WORKS COMPANY, INC.,
Plaintiff,

vs.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SAMUEL PIERCE, as Secretary of the United States Department of Housing and Urban Development; BUFFALO URBAN RENEWAL AGENCY (Previously Known as Department of Urban Renewal and Department of Community Development of the City of Buffalo); CITY OF BUFFALO: JAMES D. GRIFFIN, as Mayor of the City of Buffalo and as Chairman of the Buffalo Urban Renewal Agency,
Defendants.

CIV-85-545C

APPEARANCES:

EMIL L. COHEN, ESQ., Buffalo, New York,

and

KENNETH F. JOYCE, ESQ., Buffalo, New York
for Plaintiff.

ROGER P. WILLIAMS, ESQ., United States Attorney (RODNEY O. PERSONIUS, ESQ., Assistant United States Attorney, of Counsel), Buffalo, New York, for Defendants United States Department of Housing & Urban Development and Samuel Pierce.

MOOT & SPRAGUE (MICHAEL A. BRADY, ESQ., and LINDA L. KAUMEYER, ESQ., of Counsel), Buffalo, New York, for Defendants City of Buffalo, and Mayor James D. Griffin.

Plaintiff in this action was forced to relocate its business in 1972 due to an Order of Condemnation entered on its property as part of the City of Buffalo's Waterfront Redevelopment Project [Waterfront Project]. In 1972, the New York Supreme Court awarded plaintiff condemnation payments pursuant to New York State law. Since that time, plaintiff has sought additional relocation payments under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 [Uniform Act], 42 U.S.C. §4601, *et seq.* The instant action continues that effort.

In the instant action, plaintiff seeks judicial review pursuant to 5 U.S.C. §§702 and 704 (Item 1) of a decision by the United States Department of Housing and Urban Development [HUD]. On February 26, 1985, HUD denied plaintiff's claims under the Uniform Act. Item 35, Exh. 29. The HUD decision affirmed prior decisions by defendant Buffalo Urban Renewal Agency [BURA], which by contract with HUD pays claims under the Uniform Act for the Waterfront Project. Item 1, ¶9. In the HUD proceeding, plaintiff sought $295,773.24 in "actual moving expenses" and $138,784.00 in "actual search expenses" related to its 1972 relocation.

The Uniform Act complements, and sometimes supplements, state court eminent domain payments. However, section 4631(b) of the Uniform Act prohibits

payment when a claimant has received money at the state level having "substantially the same purpose or effect" as money sought under the Uniform Act. *See also* 24 C.F.R. §42.40. HUD denied plaintiff's claim for moving expenses on this ground, finding that plaintiff's New York State condemnation award had already provided payment having substantially the same purpose or effect as payment for actual moving expenses. Item 35, Exh. 29, p. 6.

HUD regulations pertinent to the Uniform Act normally limit "search expenses" under the Uniform Act to $500.00. An exception is allowed for expenses arising from special circumstances that are documented by "receipted invoices where appropriate." Item 37, Exh. 2, ¶86(b). HUD denied plaintiff's claim for $138,784.00 in search expenses on the ground that the claim was inadequately documented. Item 35, Exh. 29.

Defendants now move for summary judgment pursuant to Fed.R.Civ.P. 56. Defendants contend that HUD's denial of plaintiff's claim on these grounds was reasonable and a proper exercise of agency discretion. Defendants also contend that the HUD decision properly denied plaintiff's claim on the additional ground of *laches*.

Plaintiff cross-moves for summary judgment. Plaintiff asserts that HUD's determination that plaintiff had already received actual moving expenses under the New York State condemnation award is an abuse of discretion because that determination is contrary to a decision on the same issue by the United States Tax Court in *Buffalo Wire Works Co., Inc. v. Commissioner of Internal Revenue*, 74 T.C. 925 (1980), *aff'd*, 659 F.2d 1058 (1981). Plaintiff contends that the decision of the United States Tax Court is *res judicata* for the instant action. Plaintiff

also argues that HUD's denial of plaintiff's claim for "search expenses" was arbitrary and capricious because HUD and BURA allegedly disregarded relevant documentation presented by plaintiff (Item 32, pp. 33-36). Finally, plaintiff contends that the defense of *laches* is not before this court. Plaintiff argues that although the BURA decision denied plaintiff's claim on this ground, the HUD affirmance of that decision does not rely on *laches*.

Factual and Procedural Background

The parties have been involved in a number of prior proceedings whose history bears on the claims and defenses in this action. It is necessary to review this history in some detail.

An Order of Condemnation was entered against plaintiff's property in 1967, as part of the Buffalo Waterfront Project. On July 31, 1969, Justice Alfred Kramer of the New York Supreme Court fixed the compensation to be paid plaintiff for the land and buildings taken in the condemnation of plaintiff's property. However, Judge Kramer found that there was insufficient evidence to determine the value of plaintiff's movable fixtures. For purposes of valuing these fixtures, Judge Kramer directed the parties' attention to the formula set forth in *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969). Item 35, Exh. 30, p. 4. The *Rose* formula requires that the value of movable fixtures is to be determined as the lesser of two values: (1) the difference between salvage value of such items and their present value in place (*i.e.*, reproduction cost less depreciation); or (2) the actual or contemplated costs of disassembly, trucking, and reassembling such items.

Judge Kramer determined that the value of plaintiff's movable fixtures according to (1) above was $976,813.00. He determined that the value according to (2) above was $480,744.87, based upon plaintiff's proposed move to a West Seneca, New York, site (plaintiff later actually moved to a site on Clinton Street in Buffalo). Item 35, Exh. 2. Pursuant to the *Rose* formula, the latter, lower figure was paid plaintiff as part of the total condemnation award entered by judgment of the court on February 1, 1972. The total condemnation award was summarized by the court as follows:

Value of Land	$195,000.00
Value of Buildings	$440,000.00
Moving, etc.	$480,744.87

In January, 1972, and again on February 7, 1972, plaintiff presented to BURA a claim for $1,605.00 for the "cost of moving personal property" during its relocation. Plaintiff stated that this cost was independent of those "moving items" used as a criterion for calculating the State condemnation award. In the February 7, 1972, letter to BURA, plaintiff also made a claim under the Uniform Act for search expenses of $9,153.18, attorney's fees of $114,107.25, and appraisal and witness fees of $10,973.74. Item 35, Exh. 10.

On August 18, 1972, the Corporation Counsel of the City of Buffalo stated in a letter to counsel for plaintiff that plaintiff's claims of February 7, 1972, were denied. However, BURA did not itself directly respond to plaintiff's claims, and plaintiff commenced an action in United States District Court, Western District of New York, on January 23, 1973, to compel a hearing and decision by BURA on these claims. Item 35, Exh. 16.

The parties thereafter agreed that plaintiff's federal court action would be stayed while BURA conducted a hearing for plaintiff. The hearing was held on May 23, 1973, and BURA denied plaintiff's claims on January 10, 1974. However, BURA's one-paragraph decision did not give any explanation of its denial, contrary to HUD regulations. Plaintiff requested such explanation and further review by BURA. When no response from BURA was received, plaintiff filed an amended complaint on March 28, 1974, in its federal court action. The amended complaint asserted that plaintiff had exhausted administrative remedies and sought essentially the same sum of money claimed in the February 7, 1972, letter to BURA. Item 43, Exh. 1.

On April 9, 1974, BURA provided plaintiff with the specific reasons for its denial of plaintiff's claim. BURA also provided plaintiff with an outline of BURA's grievance procedures. Those procedures provide claimants with the right to have an adverse decision orally reviewed by the head of the Agency or a representative. BURA advised plaintiff that upon request it would schedule such a review for plaintiff and would potentially modify its decision in light of any additional material plaintiff might present at that time. Item 35, Exh. 22. Plaintiff requested such review and unsuccessfully sought to have the parties stipulate that plaintiff might serve a further amended complaint in its federal court action if plaintiff still considered itself aggrieved after this hearing. Item 43, Exh. O.

Plaintiff appeared at the review of its claim by BURA on May 9, 1974. At the review, plaintiff presented no additional documentation to support its claim for $1,605.00 in moving expenses. Plaintiff reduced its search expense claim from $9,153.00 to $4,215.39 and

submitted further invoices, but BURA indicated that more information was required to determine the eligibility of these expenses. Plaintiff presented no additional documentation to support its claim for $114,107.25 in attorneys' fees or $10,973.74 in appraisal and witness fees. The review concluded with the understanding that a final written decision would be stayed pending additional submissions by plaintiff (Item 43, Exh. Q; Item 42, p. 50).

On May 29, 1974, plaintiff submitted to BURA two additional documents related to search expense. Plaintiff also advised BURA that:

> the explanation furnished at the oral presentation [on May 9, 1974] with respect to the claims for "attorney's fees appraisal and witness' fees" . . . indicated the desirability of further research of the law with regard thereto and the submission of a memorandum thereon by the attorney for the claimant. *That research is being conducted at this time and the memorandum will be submitted as soon as it has been completed. It is our understanding that after the submission has been completed, the original determination* [*the January 10, 1974, denial of plaintiff's claim by BURA*] *will be reviewed . . .*

Item 35, Exh. 24 (emphasis added).

Plaintiff, however, never submitted the referenced memorandum of law to BURA and did not contact BURA again for more than eight years, until January 17, 1983, when plaintiff submitted a "Restatement of Claim" to BURA. Plaintiff also took no further steps in its federal court action, and that action was dismissed without prejudice on September 8, 1975. Item 35, Exh. 26.

Plaintiff explains its sudden suspension of activity before BURA by noting that at about this time the United States Internal Revenue Service began an audit

of plaintiff. That audit eventually led to the filing of a Notice of Deficiency against plaintiff on April 28, 1975. (Item 49, p. 14; Item 46, Exh. A.) The IRS Notice of Deficiency claimed that plaintiff had received moving expense payments under the New York State condemnation award that should have been reported as ordinary income. Plaintiff contends that its disputes with BURA and with the IRS thus centered on the same issue—whether plaintiff had received moving expense payments under the New York State condemnation award. Plaintiff states that "it would have been inadvisable and needless duplication of time and effort to litigate the issue in two forums at the same time." Item 42, p. 11. Plaintiff states that it therefore directed its energies exclusively to fighting the IRS claim. However, plaintiff does not contend that it informed BURA of this fact, nor does the record reflect any such notice to BURA.

On July 31, 1980, the United States Tax Court ruled in favor of plaintiff, holding that the payments in question were involuntary conversions of property into money and not taxable income. Item 35, Exh. 30. This decision was affirmed by the United States Court of Appeals for the Second Circuit in an unpublished decision on April 28, 1981. Item 43, Exh. 7.

On January 17, 1983, plaintiff submitted what it described as a "Restatement" of its claim before BURA. Plaintiff's original claim, as noted, had been set out on February 7, 1972, and last heard by BURA on May 9, 1974. BURA had stayed its decision on this claim, pending promised submissions by plaintiff of search expense documentation and a memorandum of law. Plaintiff had never submitted the latter. Plaintiff's restated claim was said to be made "in light of" the 1980 and 1981 decisions in plaintiff's tax court litigation.

Those decisions, plaintiff contended, established that plaintiff's State condemnation award "was not a reimbursement of actual moving expenses" and therefore established that plaintiff was entitled to reimbursement for all moving expenses under the Uniform Act. Item 35, Exh. 27. Plaintiff's restated claim sought different and additional reimbursement from that sought by plaintiff's original claim before BURA.

Plaintiff's original claim in 1972-1974 sought the following sums:

For "moving personal property"	$ 1,605.00
For "search expenses"	$ 9,153.18 (later reduced to $4,215.39)
For "attorney's fees"	$114,107.25
For "appraisal and witness fees"	$ 10,973.74 (later increased to $11,012.00)
Total claimed	$135,839.17

Item 35, Exh. 10.

In contrast, plaintiff's January 17, 1983, Restatement of Claim is for the following sums:

For "moving expenses"	$295,773.24
For "search expenses"	$138,784.53
Total claimed	$434,557.77

Plaintiff apparently consented by its restated claim that attorney's fees and appraisal and witness fees are not reimbursable under the Uniform Act. The large increase in plaintiff's claim for moving expenses represents plaintiff's view, in light of the decisions from its tax litigation, that it was reimbursed for *no* actual moving expenses under the New York State condemnation award, and is therefore entitled to reimbursement for all moving expenses under the Uniform Act.

BURA did not respond to plaintiff's restated claim (nor to several follow-up letters) until April 9, 1984. BURA then rejected plaintiff's claim, for *laches,* and on the ground that plaintiff's restated claims were time-barred, as claims "decidedly different" from plaintiff's original ones. Item 35, Exh. 28.

The HUD decision of February 26, 1985, reviewed the history of plaintiff's claims before BURA and affirmed BURA's denial of those claims.

On April 25, 1985, plaintiff filed the instant action, seeking judicial review of the February 26, 1985, HUD decision.

Discussion

A decision denying a claim for relocation benefits under the Uniform Act must be affirmed unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Highway Pavers v. Secretary of U.S. Dept. of Interior,* 650 F. Supp. 559, 561 (S.D. Fla. 1986); *Starke v. Secretary of U.S. Dept. of Housing,* 454 F. Supp. 477, 483 (W.D. Okla. 1977). Such a determination is properly made by summary judgment where, as here, there is no genuine dispute as to any material fact. Fed.R.Civ.P. 56. Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex v. Catrett,* 106 S.Ct. 2548, 2555 (1986).

I.

Plaintiff contends, first, that although the BURA decision clearly denied plaintiff's claims upon the ground of *laches,* the HUD affirmance of that decision did not.

Plaintiff therefore contends that this defense is not before the court, and is not to be considered in the court's review of the HUD decision. Plaintiff bases this contention upon the principle stated in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87.

The BURA decision of April 9, 1984, reviewed the events of plaintiff's original claim and then denied plaintiff's restated claim on the ground that plaintiff was "barred, for laches, from pursuing such claim(s)." Item 35, Exh. 28. The HUD affirmance states generally that "we agree with [BURA's] determination to disallow the claim." Item 35, Exh. 29, p. 6. With particular reference to plaintiff's claim for search expenses, the HUD decision further states that:

> the claimant and his attorney were informed on May 9, 1974, that the Agency needed adequate documentation to support the claim for Search Expense. . . .
>
> As of the date of this review, no such acceptable documentation has been submitted by the claimant or his attorney. More than ten years has elapsed since May 9, 1974. The claimant, has therefore, had more than adequate time to submit acceptable documentation to support the claim for Search Expense.

It is clear from this statement that plaintiff's long delay in submitting adequate documentation was central to HUD's affirmance of BURA's denial of plaintiff's claim for search expense. I therefore find that the HUD decision did deny at least plaintiff's claim for search expenses on the ground of *laches*.

Under New York law, *laches* will be invoked to bar recovery where a plaintiff's inaction has prejudiced defendant and rendered it inequitable to permit recovery. *Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 331-32 (1940); *Airco Alloys v. Niagara Mohawk*, 76 A.D.2d 68, 82 (4th Dept. 1980). In the instant case, plaintiff denies that it was inactive. Plaintiff contends that it attempted to adequately document its search expense claim but that its effort was hindered by BURA's refusal to accept plaintiff's submitted invoices. However, the record reflects that although BURA once, on February 1, 1972, rejected invoices from plaintiff related to moving expenses (Item 43, Exh. 16), BURA thereafter invited and accepted documentation from plaintiff regarding moving and search expenses (Item 35, Exh. 25). As noted, BURA denied plaintiff's claims on April 9, 1974, but indicated that its decision was subject to internal review and modification in light of additional material plaintiff might submit. On May 9, 1974, after an oral review of plaintiff's claim, BURA agreed to stay written decision until plaintiff could submit further documents, including a memorandum of law (Item 43, Exh. Q; Item 35, Exh. 24). Plaintiff never submitted the memorandum of law and did not contact BURA again regarding its claims for more than eight years, until plaintiff submitted its restated claim on January 17, 1983.

Moreover, when plaintiff did contact BURA after this eight-year interval, it increased its search expense claim from $4,215.00 to $138,784.53. This radical alteration in plaintiff's claim, after an eight-year delay, is clearly prejudicial to defendants. The difficulty of defending against an essentially new claim related to a long past event is compounded here by the fact that several of the key individuals in the original State condemnation proceedings and in BURA at the time of plaintiff's

relocation have either retired or died. Item 34. Further, the Waterfront Project was concluded in 1980, and federal funds earmarked for the project were closed out. Item 35, Exh. 31; Item 33, Dudek Affidavit. Non-federal defendants are thus additionally prejudiced by plaintiff's delay because these funds are no longer available to satisfy a claim under the Uniform Act, as they were before 1980.

Finally, plaintiff offers no justification for the long suspension in pursuing its claim for search expenses. Plaintiff states that it did not contact BURA about its claim for eight years because it was then litigating an identical issue with the IRS: whether plaintiff had received reimbursement for moving expenses under the New York State condemnation award. However, this explanation could not justify plaintiff's delay in pursuing its claim for search expenses, since search expenses were not at issue in the IRS litigation.

Under these circumstances, I find that HUD's denial, for *laches,* of plaintiff's claim for search expenses was neither arbitrary nor capricious, but rather a reasonable exercise of agency discretion.

II.

It is less clear that the HUD decision relies upon *laches* to deny plaintiff's claim for moving expenses. Since the HUD decision more clearly relies upon another reasonable ground for denying this portion of plaintiff's claim—the determination that plaintiff's New York State condemnation award already provided payment having substantially the same purpose or effect as payment for actual moving expenses—I shall discuss that ground only.

At issue here is the relation between amounts paid to plaintiff under the State condemnation award and amounts claimed by plaintiff under the Uniform Act.

As noted, plaintiff's condemnation award provided payment in the amount of $480,744.87 for "Moving, etc." This figure was arrived at by the formula set out in *Rose v. New York, supra*, which measures the value of movable fixtures as the lesser of

> (1) the difference between salvage value of such items and their present value in place (*i.e.*, such reproduction cost less depreciation); or
> (2) the actual or contemplated costs of disassembly, trucking, and reassembling such items.

Item 35, Exh. 30, p. 5. Plaintiff received payment for the calculated cost of (2) above, the lesser figure. Plaintiff contends that this payment was not really *for* (2) above, and that this confirmed by the holding in *Buffalo Wire Works v. Commissioner of Internal Revenue, supra*. Plaintiff states at one point that this payment was not for actual moving costs, but rather for loss of the "added value" represented by the fixtures in place at its old waterfront site.

The Uniform Act provides compensation for moving expenses on the following basis:

> Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person . . . the head of such agency shall make a payment to any displaced person, upon proper application . . . for—
>
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property . . ..

42 U.S.C. §4622. HUD regulations do not allow payment under the Uniform Act when such payment would "duplicate a payment received . . . under the State law of eminent domain . . . if such payment is determined by HUD to have substantially the same purpose or effect as a payment under this part."

In sum, plaintiff is not entitled to reimbursement for actual moving costs under the Uniform Act if HUD reasonably found that plaintiff received payment under the State award having substantially the same purpose or effect as reimbursement for actual moving costs.

Plaintiff claims that it did not receive payment for actual moving costs under the State condemnation award and therefore is entitled to such payment under the Uniform Act. Plaintiff notes that the court in *Buffalo Wire Works v. Commissioner of Internal Revenue, supra*, [*BWW*] states that plaintiff's condemnation payment was "not an award of actual moving costs." Item 35, Exh. 30, p. 9. Plaintiff argues that this determination also necessarily determines that plaintiff's condemnation payment did not have substantially the same purpose or effect as a payment for actual moving costs and therefore did not bar payment of plaintiff's claim under the Uniform Acts. Plaintiff contends that this determination was binding upon HUD under principles of *res judicata*, and that HUD's decision to the contrary was therefore an abuse of discretion.

Defendants note that for *res judicata* to apply, there must be, *inter alia*, an identity of issues; defendants claim that the issue in *BWW* is distinct from the issue before HUD, and that HUD therefore properly rejected plaintiff's attempted reliance upon the decision in *BWW*.

The dispute in *BWW* centered upn the fact that plaintiff deducted from its taxable income for 1965-72 its payment for "Moving, etc." while the IRS

> recharacterized [that] portion of the condemnation award . . . as being reimbursement for moving expenses *rather than an amount realized upon the involuntary conversion of property into money.* [Plaintiff's] income for 1972 was increased by the amount of such reimbursement.

Item 35, Exh. 30, p. 1 (emphasis added). The court states:

> the basic issue to be decided in this case is whether the portion of the condemnation award which totaled $480,744.87 should be treated *for purposes of Federal income taxation* as reimbursement of moving expenses *or as money into which property has been converted.*

Item 35, Exh. 30, p. 14 (emphasis added).

The court eventually concluded that

> the portion of petitioner's condemnation award which was determined by reference to moving expenses constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses.

Item 35, Exh. 30, p. 17.

I believe that these statements clearly indicate that the holding in *BWW* is a narrow one not apposite to the issue before HUD. *BWW* is only concerned with the tax identity of the money received by plaintiff for "Moving,

etc." in its State condemnation award. For *federal tax purposes*, there is a categorical distinction, a difference in income, between payment received for an involuntary conversion of property into money, and payment received for moving expenses. But for purposes of the issue before HUD, that distinction is immaterial. There is no necessary incompatibility between the holding in *BWW* that plaintiff's payment was an involuntary conversion of property into money and HUD's finding that plaintiff's payment had substantially the same purpose or effect as a payment for actual reasonable moving expenses. Put simply, plaintiff may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money.

Further, the court's statement in *BWW* that plaintiff's condemnation award was "not an award of actual moving costs" must be put in context. The court in *BWW* noted that the New York Supreme Court determined the costs of "moving, disassembling, trucking, reassembling, and relocating [plaintiff's] fixtures" based upon a *projected* move by plaintiff to a property in West Seneca, New York. Item 35, Exh. 30, pp. 6-7. The court noted that plaintiff later "decided to explore alternative relocation sites. Petitioner learned that a . . . facility located at 1165 Clinton Street in Buffalo was available and decided to acquire that property." *Id.* p. 7. Plaintiff *actually* moved to the Clinton Street property in 1972. However, on December 1, 1971, the New York Supreme Court determined the costs of moving plaintiff's fixtures based upon plaintiff's earlier projected move to West Seneca. The court in *BWW* states:

> the New York State Supreme Court made its findings concerning the costs of moving petitioner's fixtures from the Lower Terrace property to the

West Seneca property. The court determined that the costs of moving, disassembling, trucking, reassembling, and relocating the fixtures would be $480,744.87, which amount was the sum of the following nine components:

(1) The cost of motorizing and electrically preparing certain machinery for the purpose of moving was found to be $19,165;

(2) The cost of engineering services related to the relocation and layout of fixtures in the new plant was found to be $80,718;

(3) The cost of disconnecting and reconnecting pneumatic equipment was found to be $11,101.85;

(4) The cost of disconnecting and reconnecting the water supply was found to be $516;

(5) The cost of disconnecting and reconnecting the electrical system was found to be $12,871.02;

(6) The cost of rigging and trucking the fixtures, including the cost of making necesary wall openings, was found to be $274,229;

(7) The cost of moving raw materials, finished goods, stock, and miscellaneous items was found to be $39,750;

(8) The cost of restoring the machines to the same operating condition as existed before the move was found to be $39,394; and

(9) An additional award of $3,000 was included pursuant to section 8303(a)(2), N.Y. Civ. Prac. Law (Consol.), because the court found the case to have been "difficult and extraordinary."

Item 35, Exh. 30, pp. 7-8.

These determinations are pertinent to the "actual or contemplated costs of disassembling, trucking, and reassembling" plaintiff's movable fixtures, which the New York Supreme Court was required to determine pursuant to the *Rose* formula. Since this determination

was made prior to plaintiff's actual relocation, and was based on plaintiff's projected move to West Seneca, New York, rather than on plaintiff's actual move to Clinton Street in Buffalo, New York, these are clearly payment figures reflecting "contemplated," not actual, costs of moving. Thus, the court in *BWW* concludes that "the foregoing amounts were determined on the basis of evidence at hearings but is not an award of *actual* moving costs." *Id.*, p. 9.

However, it is a different question whether this award has "substantially the same purpose or effect as a payment for actual moving expenses." There is certainly no question that the award was *for* moving expenses, as reflected by the itemized description of the award above. Further, when plaintiff *actually* moved to the Clinton Street property, its actual moving costs were only $279,266.85, as reflected by its 1983 restated claim to BURA. Item 35, Exh. 27. Thus, the $480,744.87 State condemnation award to plaintiff for its contemplated costs of moving paid plaintiff $201,478.02 *more* than plaintiff's actual moving expenses. Under these circumstances, I find that it was a reasonable exercise of agency discretion for HUD to determine that plaintiff had received, in its State condemnation award, payment having substantially the same purpose or effect as a payment for actual moving expenses.

Accordingly, for all the reasons above, defendants' motion for summary judgment is granted, and the February 26, 1985, decision of HUD denying plaintiff's claims under the Uniform Act is affirmed in all respects.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: November 5, 1987

Appendix "C"—HUD Decision (In This Case).

U.S. Department of Housing and
Urban Development

Buffalo Office, Region II
107 Delaware Ave., Statler Bldg.
Buffalo, New York 14202-2986

February 26, 1985

Mr. Emil L. Cohen
Attorney at Law
Suite 429
Statler Building
Buffalo, NY 14202

Dear Mr. Cohen:

SUBJECT: Grievance, Buffalo Wire Works Company, Inc., 1165 Clinton Street, Buffalo, New York; and formerly of 308-320 Lower Terrace, Buffalo, New York; Urban Renewal Project NYR-35

This letter is in response to your request that this Office review the decision of the City of Buffalo Urban Renewal Agency (Project NYR-35) regarding your client's relocation claim.

According to HUD grievance procedures, we have reviewed:

1. All pertinent material upon which the Buffalo Urban Renewal Agency made its original determination including all applicable rules and regulations.

2. All written material submitted by claimant and all available material from other sources that was not previously submitted.

3. The reasons given by claimant for requesting review and reconsideration of his claim.

4. All information presented by claimant's attorney during course of a meeting held on October 25, 1984.

Based upon the information submitted, a thorough review was conducted. Our determination of the claimant's entitlement is based upon application of the Uniform Relocation and Real Property Acquisition Policies Act of 1970, and HUD Regulations 24 CFR, Part 42, dated May 13, 1971; and HUD Handbook 1371.1 (Relocation Policies and Requirements Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970) dated July 30, 1971; and 1371.1, Change 1, dated October 29, 1971 (Chapter 6, Section 5, Relocation Payments for Business Concerns, Nonprofit Organizations, and Farm Operations).

In addition, our determination also considered input provided this Office by the HUD Central Office and the Office of the General Counsel.

Background and pertinent information follows:

Claimant owned and operated a wire manufacturing business known as "Buffalo Wire Works Company, Inc.", located at 308-320 Lower Terrace, Buffalo, New York. Claimant also owned the real estate and equipment and fixtures at the same address. Said location was designated as Parcel D-4-9 of Urban Renewal Project NYR-35. The Project was approved for funding in 1964.

Subsequent to condemnation proceedings, the City of Buffalo took title to the claimant's real property on February 15, 1972. On March 15, 1972, the claimant moved to and continued to operate his business at the

replacement location: 1165 Clinton Street, Buffalo, New York. The move was completed on or about April 15, 1972.

MOVING COSTS INCLUDED IN CONDEMNATION AWARD:

In a decision dated December 1, 1971, New York State Supreme Court Judge Alfred M. Kramer made his final determination in this matter. On Page 12 of said Memorandum, the Judge stated: "The matter before this Court is to determine the costs of disassembling, trucking, reassembling and relocation generally as per the memorandum of this Court dated December 10, 1969 and as per order of this Court dated December 24, 1969."

The Judge stated "Judgment is directed herein in favor of Buffalo Wire Works, Inc., against the City of Buffalo for the sum of $1,115,744.87." The sum was tabulated as follows:

Value of Land	$ 195,000.00
Value of Buildings	440,000.00
Moving, Etc.	480,744.87
TOTAL	$1,115,744.87

Value of the machinery (fixtures) in place was determined to be $976,813. However, because the estimated moving and reinstallation costs were found to be less than the value of the machinery in place, the Court awarded the claimant the moving costs and not the value of the machinery in place. As stated previously, said moving costs allowed by the Court were $480,744.87.

The $480,744.87 figure was detailed as follows:

Motorization and Electrical Preparation of Machines	$ 19,165.00
Engineering	80,718.00
Pneumatic Disconnect & Reconnect	11,101.85
Water Disconnect & Reconnect	516.00
Electrical Disconnect & Reconnect	12,871.02
Wall Openings (were included in Rigger's Estimate)	
Rigging and Trucking	274,229.00
Moving Raw Materials, Etc.	39,750.00
Additional Engineering Service (Included in Rigger's Estimate)	
Business Interruption, Etc.	NONE
Warehousing	NONE
Realignment and Rework	39,394.00
Additional Allowance	3,000.00
TOTAL	$480,744.87

The chief witness for the City, Mr. Desmond Donovan was described by the Judge as "a man of wide experience in this work (Rigging and Trucking) and is eminently qualified."

"The estimate includes the cost of materials, equipment and labor to sheet machines requiring same for safe hauling, removing from locations in buildings, loading on trucks, delivery to a new plant, unloading and moving to properly designated positions in the new building, setting up, levelling and aligning machines for operation after properly locating the machines, anchoring of machines to the floor when required, checking out machines by millwrights and making necessary adjustments after the machines are started up for production so that the machines would be in a state of

operation that they were in before the move. My findings in regard to realignment and rework must be considered in addition to the above."

"Such estimation includes all openings and closings necessary."

Under heading of "Moving Raw Materials, Finished Goods, Stock and Miscellaneous Items", the Judge said "The Court finds the City's estimate of this work is fair, reasonable and adequate in the sum of $39,750.

Information supplied to this Office indicates that Mr. Donovan examined all items to be moved including all office equipment. Mr. Donovan listed the items under "miscellaneous" in the estimate of "Stock, Materials and Miscellaneous."

SUMMARY

Based upon the above and other material, we have determined that the claimant was paid for his moving expense. Therefore, he did in fact receive a relocation payment that was covered by the sum of $480,744.87.

The claimant has maintained that he has never received a relocation payment. Whatever he considers the sum of $480,744.87 to represent is not clear. What is clear is that the claimant was paid for his moving costs, and that Federal Law prohibits duplicate payments (Uniform Act-P.L. 91-646, Title II, Section 211(b)).

The Agency has always taken the position that the claimant was paid for his moving costs covered by the sum of $480,744.87. The only exception the Agency has made is the possibility that a properly documented claim for "Search Costs" may be reconsidered in addition to the $480,744.87 previously awarded to the claimant for his moving costs. We agree with the Agency.

RELOCATION CLAIMS:

Subsequent to claimant's move from the acquired site, he submitted a relocation claim to the Agency. The Total amount of the claim was $135,877.18 and was detailed as follows:

Item No.	*Description*	*Amount Claimed*
(1)	Moving of Personal Property	$ 1,605.00
(2)	Actual Reasonable Search Costs	9,153.18
(3)	Attorney's Fees	114,107.00
(4)	Appraisal & Witness Fees	11,012.00
	TOTAL	$135,877.18

All items of the claim were denied by the Agency in a letter to the claimant dated January 10, 1974. More detailed explanation for the denial was sent to the claimant on April 9, 1974. The reasons for denial by the Agency are as follows:

ITEM (1)—Moving of Personal Property

The amount of the claim is $1,605. Said amount is included in the $480,744.87 previously awarded claimant under "Moving, etc." in the condemnation award. We agree with the Agency's determination.

ITEM (2)—Actual Reasonable Search Expenses

The amount of the claim is $9,153. "It was disallowed because supporting documentation was insufficient to substantiate these costs. Although copies of checks and invoices were submitted to this Agency, eligibility of these services for reimbursement is not established. That is to say, the precise nature and extent of these services is not clearly set forth. The Federal regulations stipulate that costs incurred in searching for a new location are generally limited to $500. Approval of an amount in excess thereof would be subject to very special

circumstances, and would as a requisite require more detailed supporting documentation than has been submitted to this Agency". We agree with the Agency's determination. The specific regulation is found in HUD Relocation Handbook 1371.1, Change 1, dated 10/71, Chapter 6, Section 5, Paragraph 86—Searching for A Replacement Location.

ITEM (3)—Attorney's Fees

The amount of the claim is $114,107. The claim was disallowed because it was deemed ineligible under the Uniform Act—P.L. 91-646, Title III, Section 304(a). The Agency said in part, "That statute provides that certain litigation expenses in Federal condemnation proceedings are reimburseable, if in the opinion of the Court: (1) the final judgment is that the Federal agency cannot acquire the property by condemnation, or (2) the proceeding is abandoned by the United States. As neither of these qualifications were in fact met, we do not consider these costs as compensable." We agree with the Agency.

ITEM (4)—Appraisal and Witness Fees

The amount of the claim is $11,012. The Agency disallowed the claim for the same reasons cited in ITEM (3). We agree with the Agency.

Included in the Agency letter of April 9, 1974 was an outline of the Agency grievance procedures.

On May 9, 1974, an oral review was held at the Agency. Attending were representatives from the Agency and the claimant and his attorney. The claimant's attorney stated that the originally claimed amount for Search Expenses of $9,153 had been reduced to a claim of $4,215.39, based upon the Agency letter of April 9, 1974. Thus, the total amount of the claim (Items 1 through 4) was now $130,939.39, a reduction of $4,937.61.

The Agency again repeated their determination concerning all Items in the claim. In reference to Item (2) Search Expense, the Agency repeated the need for adequate documentation to support "the eligibility for these services." The type of documentation that would be given consideration by the Agency was described.

The review was concluded with the understanding (in reference to the claim for Search Expenses), that the claimant's attorney would "submit such evidence and material which may further support his client's claim and justify further review . . . ." It was agreed that a written determination based upon the Agency's review would be held in abeyance pending the submission of the above described documentation.

No such adequate documentation has been submitted by the claimant or his attorney since the date of review, May 9, 1974.

In a letter to the Agency dated January 17, 1983, (almost ten years since the date of the oral review), the claimant claimed that he had never received a payment for his relocation expenses under the Uniform Act (directly or indirectly). As a basis for his claims, he cites rulings in his favor involving tax matters, by the United States Tax Court and the United States Court of Appeals for the Second Circuit.

His new claim is for a total of $434,557.77 and covers period "Pre 1965," 1965-1972", and "Post 1972."

Search Expense, (included in the total claim of $434,557.77) has now zoomed from the figure of $4,215.39 on May 9, 1974 to the sum of $138,784.53. The difference between $434,557.77 minus $138,784.53 is listed as moving expense $295,773.24.

In a letter to the claimant's attorney dated April 9, 1984, the Agency again disallowed the claim citing various reasons. We agree with the Agency's determination to disallow the claim. Our reasons for disallowing the claim are as follows:

1. As stated previously, the claimant was previously paid for his moving expense, and Federal Law prohibits duplicate payments.

2. Again, as stated previously, the claimant and his attorney were informed on May 9, 1974, that the Agency needed adequate documentation to support the claim for Search Expense. The type of documentation that would be given consideration by the Agency was described. On said May 9, 1974, the claimant's attorney agreed that he would submit to the Agency such "evidence or material" to support the claimant's claim for Search Expense. It was also agreed that a written determination based upon the Agency's review would be held in abeyance pending the submission of the above described documentation.

As of the date of this review, no such acceptable documentation has been submitted by the claimant or his attorney. More than ten years has elapsed since May 9, 1974. The claimant, has therefore, had more than adequate time to submit acceptable documentation to support the claim for Search Expense. Mere unsupported statements and/or insufficiently documented claims are not considered sufficient to make a determination that the claim for Search Expense is allowable.

RECAPITULATION:

CLAIM MADE PRIOR TO JANUARY 1974

Item No.	*Description*	*Amount of Claim*	*Amount Allowed By Agency*	*Amount Allowed By HUD*
1	Moving of Personal Property	$ 1,605.00	$0.00	$0.00
2	Actual Reasonable Search Expenses	9,153.18	0.00	0.00
3	Attorney's Fees	114,107.00	0.00	0.00
4	Appraisal and Witness Fees	11,012.00	0.00	0.00
	TOTAL	$135,877.18	$0.00	$0.00

CLAIM AS OF MAY 9, 1974

Item No.	*Description*	*Amount of Claim*	*Amount Allowed By Agency*	*Amount Allowed By HUD*
1	Moving of Personal Property	$ 1,605.00	$0.00	$0.00
2	Actual Reasonable Search Expenses	4,215.39	0.00	0.00
3	Attorney's Fees	114,107.00	0.00	0.00
4	Appraisal and Witness Fees	11,012.00	0.00	0.00
	TOTAL	$130,939.39	$0.00	$0.00

CLAIM MADE BY LETTER DATED JANUARY 17, 1983

Item No.	*Description*	*Amount of Claim*	*Amount Allowed By Agency*	*Amount Allowed By HUD*
1	Moving Expense	$295,773.24	$0.00	$0.00
2	Search Expenses	138,784.53	0.00	0.00
		$434,557.77	$0.00	$0.00

CONCLUSION

The Agency was correct in its determination that the claimant is not entitled to additional money.

You are hereby advised that if the claimant does not agree with this determination, he may seek judicial review.

Sincerely,

JOSEPH B. LYNCH
Manager, 2.2S

cc: Honorable James D. Griffin
Buffalo Wire Works Company, Inc.

Appendix "D"—Decision of United States Tax Court in Buffalo Wire vs. Commissioner (In Prior Case).

74 T.C. No. 67

UNITED STATES TAX COURT

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 5963-76.

Filed July 31, 1980.

The City of Buffalo condemned petitioner's land, building and fixtures. Under New York law, the award that petitioner would receive for the fixtures was determined as the lesser of: (1) the difference between present value in place and salvage value; and (2) the costs of disassembling, trucking, and resassembling the fixtures. The latter was used to value the fixtures. Petitioner treated the entire condemnation award which was received in 1972 as an amount realized upon the involuntary conversion of property into money under section 1033, I.R.C. 1954. Petitioner purchased qualified replacement property for an amount in excess of the award. Petitioner deducted moving expenses in the taxable years 1965, 1966, 1967, 1968, 1969, 1971, and

1972 in connection with the relocation of its business. The Commissioner recharacterized the portion of the condemnation award which was measured by reference to moving expenses as being reimbursement for moving expenses rather than an amount realized upon the involuntary conversion of property into money. Petitioner's income for 1972 was increased by the amount of such reimbursement, and correlative changes were made in petitioner's return. *Held,* The entire condemnation award constituted an amount realized upon the involuntary conversion of property into money. *E. R. Hitchcock Co. v. United States,* 514 F.2d 484 (2d Cir. 1975), affg. 382 F. Supp. 236 (D. Conn. 1974); *Golsen v. Commissioner,* 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971). *Held further,* The tax benefit rule does not require petitioner to include in its income for the taxable year 1972 the amounts which it deducted in prior years as moving expenses because there was no recovery during the taxable year 1972. *Held further,* The moving expenses which petitioner incurred during the taxable year 1972 were not subject to reimbursement during that year.

Emil L. Cohen, for the petitioner.

George W. Connelly, for the respondent.

OPINION

GOFFE, *Judge:* The Commissioner determined deficiencies in the Federal income tax of petitioner as follows:

Taxable Year	*Deficiency in Tax*
1969	$ 2,317
1970	2,317
1971	5,792
1972	187,345

Five issues are presented for our decision:

(1) Whether $418,052 was includable in the income of petitioner for the taxable year 1972 as ordinary income from the reimbursement of moving expenses;

(2) Whether $12,110 was includable in the income of petitioner for the taxable year 1972 as ordinary income from the excess reimbursement of moving expenses;

(3) Whether the moving expenses of petitioner for the taxable year 1972 should be disallowed because they were reimbursed during that same taxable year;

(4) Whether petitioner should include in its income for 1972 an amount equal to its claimed moving expense deductions for the taxable years 1965 through 1971 because such amounts were recovered during the taxable year 1972; and

(5) Whether petitioner correctly calculated its investment credit for the taxable year 1972 and its carryback of investment credit to the taxable years 1969, 1970, and 1971. Resolution of the fifth issue described above depends solely upon the resolution of the first four issues.

All of the facts have been stipulated. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Buffalo Wire Works Company, Inc. (hereinafter petitioner), is a corporation organized under the laws of the State of New York and at all times pertinent to this case has had its principal office and place of business in Buffalo, New York. Petitioner, an accrual method taxpayer, filed its Federal income tax returns for the taxable years 1969, 1970, 1971, and 1972 with the Internal Revenue Service Center, Andover, Massachusetts.

Petitioner owned the real property at 308-320 Lower Terrace, Buffalo, New York, and used that property as a principal place of business until February 15, 1972. Such property (hereinafter the Lower Terrace property) consisted of land, buildings, and fixtures and was used by petitioner for the manufacture of wire and wire mesh products.

In 1954, the City Planning Commission of the City of Buffalo initiated Waterfront Redevelopment Project No. UR N.Y. R-35 (hereinafter the Project). In 1956 or thereabouts, petitioner informally learned that the City of Buffalo intended to acquire a large tract of real property, of which the Lower Terrace property was a part, in connection with the Project. During 1962, in anticipation of the condemnation of the Lower Terrace property, petitioner purchased a tract of land in West Seneca, New York, which was zoned for industrial use. Such property (hereinafter the West Seneca property) was intended as the site for a replacement facility, and petitioner hired an architectural and engineering firm to prepare plans for the construction of such a facility.

By letter dated January 20, 1967, the City of Buffalo offered petitioner $399,330 for the Lower Terrace property. Petitioner did not accept the offer. Therefore, by petition dated February 28, 1967, the City of Buffalo commenced condemnation proceedings in the New York State Supreme Court. On October 4, 1967, a preliminary order of condemnation was entered, in which the court ordered that just compensation for the taking of the Lower Terrace property would be fixed and determined without submission to a jury.

Between September 10, 1968, and July 9, 1968, hearings were held to determine the value of the Lower Terrace property. By Memorandum dated July 31, 1969,

the court found that $195,000 would be just compensation for the land taken and that $440,000 would be just compensation for the buildings taken, but that there was insufficient evidence to determine the value of the fixtures which were to be removed or could be removed. For purposes of valuing such fixtures, the court directed the parties' attention to *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969), wherein the proper method of valuation was described. In short, that opinion requires that the value of fixtures which are removed or could be removed is usually to be determined as the lesser of these two values: (1) the difference between salvage value of such items and their present value in place (*i.e.*, reproduction cost less depreciation); or (2) the actual or contemplated costs of disassembly, trucking, and reassembling such items.

By Memorandum dated December 10, 1969, the court made certain findings relative to the compensable value of the fixtures in place. First, the court determined that certain items were fixtures. Specifically, the court stated as follows:

> I find all the items, I believe 162, to be fixtures in the broad definition of the word and are moveable and come within the definition in the *Rose* case (24 N.Y.2d 80). That these items can be profitably removed to another location and used by the owner and that it would be inequitable to treat these items as personalty simply because of the possibility of removal at less than total destruction of the machine or the structure which houses it.

Also the court found the sound value of the 162 fixtures in place to be $1,276,663, their salvage value to be $237,665, and the resulting difference to be $1,038,988.[1]

[1] This amount reflects an error in subtraction. $1,276,663 - $237,665 = $1,038,998.

Further, the court found that certain items which were included as fixtures in place also had been included as part of the buildings for valuation purposes. To eliminate that duplication, the court deducted the value of those duplicate items, $62,175, from the value of the fixtures in place. Thus, the court determined that the value of fixtures in place for purposes of compensation in condemnation proceedings was at most $976,813.[2] However, referring to the *Rose* case again, the court pointed out that the fixtures in place were found to be moveable and, therefore, the condemnation proceeds allocable to the fixtures in place were limited to the lower of $976,813 or the costs of disassembling, trucking, and moving them. Because there was insufficient evidence to determine the costs of disassembly, trucking, and reassembly, a hearing was set to obtain such evidence.

By Order of Judgment dated December 24, 1969, judgment was entered in favor of Buffalo Wire Works Company, Inc., in accordance with the findings in the Memorandum dated December 10, 1969, with the proviso that the award for fixtures was subject to alteration. Specifically, Buffalo Wire Works Company, Inc., was awarded $635,000 for land and buildings and $976,813 for fixtures. The value of the fixtures was to be increased by any part of $178,605 that could be proved as expenses for carting, rigging, and installation of replacement fixtures. The value for fixtures so determined would constitute the award for fixtures unless the costs of moving, disassembling, trucking, reassembling, and relocating the existing fixtures were lower, in which case the award for fixtures would be the lower amount.

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[2] This amount also reflects the subtraction error noted in footnote 1, *supra;* $1,038,988 - $62,175 = $976,813; but $1,038,998 - $62,175 = $976,823.

Further proceedings were held to determine the costs of moving, disassembling, trucking, reassembling, and relocating the existing fixtures. Such proceedings were premised upon a move of petitioner's fixtures from the Lower Terrace property to the West Seneca property. Testimony was completed by September 11, 1970.

Due to changed circumstances between the date when petitioner acquired the West Seneca property and the end of 1970, petitioner decided to explore alternative relocation sites. Petitioner learned that a 24-year old facility located at 1165 Clinton Street in Buffalo was available and decided to acquire that property (hereinafter the Clinton property).

In July 1971, petitioner formed 1165 Clinton Street, Inc., and on July 23, 1971, acquired all of its capital stock. In August 1971, 1165 Clinton Street, Inc., purchased the Clinton property for $800,000. On February 1, 1972, 1165 Clinton Street, Inc., was merged into petitioner. The parties agree that the Clinton property was acquired by petitioner during the period beginning with the earliest date of the threat or imminence of condemnation of the Lower Terrace property and ending within two years after 1972. The parties further agree that the Clinton property was acquired by petitioner to replace the Lower Terrace property and that the Clinton property is similar or related in service or use to the Lower Terrace property.

By Memorandum dated December 1, 1971, the New York State Supreme Court made its findings concerning the costs of moving petitioner's fixtures from the Lower Terrace property to the West Seneca property. The court determined that the costs of moving, disassembling, trucking, reassembling, and relocating the fixtures would be $480,744.87, which amount was the sum of the following nine components:

(1) The cost of motorizing and electrically preparing certain machinery for the purpose of moving was found to be $19,165;

(2) The cost of engineering services related to the relocation and layout of fixtures in the new plant was found to be $80,718;

(3) The cost of disconnecting and reconnecting pneumatic equipment was found to be $11,101.85;

(4) The cost of disconnecting and reconnecting the water supply was found to be $516;

(5) The cost of disconnecting and reconnecting the electrical system was found to be $12,871.02;

(6) The cost of rigging and trucking the fixtures, including the cost of making necessary wall openings, was found to be $274,229;

(7) The cost of moving raw materials, finished goods, stock, and miscellaneous items was found to be $39,750;

(8) The cost of restoring the machines to the same operating condition as existed before the move was found to be $39,394; and

(9) An additional award of $3,000 was included pursuant to section 8303(a)(2), N.Y. Civ. Prac. Law (Consol.), because the court found the case to have been "difficult and extraordinary." The foregoing amounts were determined on the basis of evidence submitted at hearings but is not an award of *actual* moving costs.

Thus, based upon the rule set forth in the *Rose* case, the court had determined that the value of fixtures in place as measured by their fair market value less salvage value was $976,813, but that the value of fixtures in place as measured by the contemplated cost of

disassembling, trucking, and reassembling the fixtures was $480,744.87. Thus, the total condemnation award was as follows:

Value of Land	$ 195,000.00
Value of Buildings	440,000.00
Value of Fixtures, not to exceed costs of moving	480,744.87
TOTAL	$1,115,744.87

By resolution passed December 28, 1971, the Common Council of the City of Buffalo directed the Corporation Counsel of the City of Buffalo to apply to the New York State Supreme Court for a final decree of condemnation for the Lower Terrace property. Pursuant to such application, that court entered its judgment on February 1, 1972, awarding petitioner $1,115,744.87 (excluding costs and disbursements) as just compensation for the taking of the Lower Terrace property. Specifically, it was ordered, adjudged, and decreed that the just compensation to petitioner be $1,115,744.87, together with costs and disbursements in the amount of $22,042.47, subject to an adjustment of taxes on the property which had been paid in advance by petitioner. Also, it was ordered, adjudged and decreed that, upon payment of the condemnation award to petitioner, the City of Buffalo be vested in title and fee simple to the real property which was the object of the condemnation proceedings.

Petitioner received checks totaling $1,141,072.45 as condemnation proceeds, which included a refund of taxes in the amount of $3,285.11, costs and disbursements in the amount of $22,042.47, and just compensation of $1,115,744.87. The parties agree that amounts received as a refund of taxes, which total $3,285.11, and amounts

received as compensation for legal, engineering, and appraisal expenses, which total $139,438, do not constitute part of the amount realized by petitioner for purposes of section 1033, Internal Revenue Code of 1954.[3] Thus, the maximum amount realized by petitioner upon the conversion of its property was $998,349 (rounded to the nearest dollar), calculated as follows:

Gross Award		$1,141,072
Less Refund of Property Tax:	$ 3,285	
Legal, Engineering, and appraisal expenses:	139,438	(142,723)
		$998,349

Petitioner made a timely election under section 1033 to recognize gain from the involuntary conversion of its property only to the extent that the amount realized upon the conversion of the property exceeds the cost of the replacement property. Petitioner expended $1,060,734 for replacement property and reported no gain from the involuntary conversion of its property.

Petitioner claimed deductions for moving expenses which it incurred during the taxable years 1965 through 1972 in the following amounts:

Taxable Year	*Amount*
1965	$ 23,377.81
1966	11,863.57
1967	15,433.39
1968	14,387.62
1969	13,953.14
1970	-0-
1971	81,193.33
1972	257,842.52
TOTAL	$418,051.78

[3] All section references are to the Internal Revenue Code of 1954, as amended.

The expenses incurred during the taxable years 1965 through 1969 and $59,769 of those incurred during the taxable year 1971 were attributable to the planned move from the Lower Terrace property to the West Seneca property. The expenses incurred during the taxable year 1972 and $21,424.33 of those incurred during the taxable year 1971 were attributable to the actual move from the Lower Terrace property to the Clinton property. None of the amounts which petitioner incurred as moving expense were included in the amount of $1,060,734 which petitioner expended for replacement property.

In his statutory notice of deficiency, the Commissioner determined that the amount of $418,052, which petitioner received as part of its condemnation award in 1972, constituted ordinary income to petitioner as a direct reimbursement of the moving expenses which had been incurred during and claimed as a deduction for the taxable years 1965 through 1972. The Commissioner determined further that petitioner received a net award of $430,162 as reimbursement for moving expenses, calculated as follows:

Award for Moving Expenses	$480,745
Portion allocable to Legal, Engineering, and Appraisal expenses	(50,583)
Net Award for Moving Expenses	$430,162

The Commissioner determined further that the difference of $12,110 between the amount of $418,052, which was received as a direct reimbursement of moving expenses, and the amount of $430,162, which was the net award, was not gain that qualifies for nonrecognition under

section 1033 because it was not an award for condemned fixtures and it did not represent an amount paid for property which could be replaced. Accordingly, petitioner's taxable income for the taxable year 1972 was increased, additional investment credit was allowed to petitioner for that year, and no carryback of investment credit to the taxable years 1969, 1970, or 1971 was allowed. The basis of the Clinton property was also determined.

A petition and answer having been filed in this case, respondent moved that he be allowed to file an amendment to his answer. Despite petitioner's objection, respondent's motion was granted. In the amend to his answer, respondent set forth three additional grounds upon which a deficiency should be predicated. Respondent has abandoned one of those grounds but maintains the following two grounds. First, respondent notes that petitioner is an accrual method taxpayer which in 1972 incurred expenses for moving which were subject to reimbursement. As such, respondent argues that the expenses incurred are deductible under section 162 only to the extent that reimbursements are included in petitioner's income. Respondent reasons that none of the reimbursements were included in petitioner's income and, therefore, no deduction for moving expenses is allowable for the taxable year 1972. Second, under the "tax benefit rule," respondent would require petitioner to include in its income for 1972 an amount equal to its deductions for moving expenses which were taken for the taxable years 1965 through 1971 and recovered in 1972.

In summary, respondent has articulated three contentions:

(1) that $430,162 of the condemnation award constituted ordinary income to petitioner, part as reimbursement for moving expenses and part as excess reimbursement for moving expenses;

(2) that the moving expenses of petitioner for the taxable year 1972 are deductible only to the same extent that the condemnation award is includable as ordinary income to petitioner in that year; and

(3) that petitioner must restore to income in 1972 the amounts that were deducted as moving expenses in the taxable years 1965 through 1971 because such amounts were recovered by petitioner through its condemnation award. By placing respondent's contentions side-by-side, it can be seen that each of the three contentions is premised on the same crucial determination, namely that a portion of petitioner's condemnation award constituted reimbursement of moving expenses. Petitioner's sole contention is that no part of its condemnation award was received as reimbursement of moving expenses, but that the entire award (less refunded property tax and legal, engineering, and appraisal expenses) constitutes an amount realized upon the involuntary conversion of property into money. Thus, the basic issue to be decided in this case is whether the portion of the condemnation award which totaled $480,744.87 should be treated for purposes of Federal income taxation as reimbursement of moving expenses or as money into which property has been converted.

A similar issue was presented in *Graphic Press, Inc. v. Commissioner*, 60 T.C. 674 (1973), revd. 523 F.2d 585 (9th Cir. 1975). There, the California Department of Public Works notified the taxpayer that the State of

California intended to condemn the taxpayer's property in connection with the widening of the San Bernadino Freeway. The State condemned the taxpayer's land, building, and fixtures. Upon condemnation of the fixtures, which included extensive machinery, the State was obliged to pay the taxpayer an amount equal to the fair market value of the fixtures unless the State could negotiate some relief from that obligation. Negotiations produced a settlement under which the taxpayer agreed to waive its right to receive an amount equal to the fair market value of the fixtures and also agreed to remove the fixtures. Correspondingly, the State agreed to compensate the taxpayer for the land, building, and fixtures in the amount of $725,000, and for moving expenses in the amount of $3,000. The Commissioner determined that $407,192 of the $725,000 condemnation award, less an allocable portion of legal fees, constituted ordinary income rather than money into which property had been converted.

In a Court-reviewed opinion, this Court decided that $407,192 of the condemnation award, less an allocable portion of legal fees, was received by the taxpayer in exchange for its waiver of the right to be compensated for the fair market value of the fixtures. Accordingly, it was held that such amount, less an allocable portion of legal fees, was includable in the taxpayer's income. On appeal to the United States Court of Appeals for the Ninth Circuit, our decision was reversed.

In its opinion, the United States Court of Appeals for the Ninth Circuit agreed that sufficient evidence existed to support a breakdown of the condemnation award into component parts, but disagreed that part of the condemnation award constituted payment for a waiver. In so holding, the court explained as follows:

> The state's right-of-way file reveals that the actual losses negotiated and compensated were moving expenses and business interruption costs. There was no evidence to indicate that any portion of the award was to pay for a waiver of the statutory right. [523 F.2d at 588.]

The court then turned to the Commissioner's argument that the portion of the condemnation award which was allocable to moving expenses was not a payment for the property taken. After referring to *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), affd. 888 F. Supp. 236 (D. Conn. 1974), and discussing generally section 1033, the court concluded as follows:

> We believe compensation in excess of land and building payments in this case qualifies for section 1033 treatment. From the taxpayer's viewpoint, he is being compensated for a loss due to the condemnation of his property. Whatever payment the taxpayer receives is attributable to the involuntary conversion. Where, as here, a payment is made for relocation costs in addition to land and building costs, as long as the condemnee reinvests the total award into other property similar or related in service or use within the statutory period, both the language and spirit of the statute have been met. [Footnote omitted; 523 F.2d at 589.]

Under the rule of *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971), we will follow the views of the United States Court of Appeals to which a case is appealable when that court has already expressed its views on an issue which is presented to us for decision. 54 T.C. at 757. In the instant case, the issue presented for decision is materially the same as that presented for decision in *Graphic Press Inc. v. Commissioner, supra.* However, appeal of our decision in this case would not be taken to the United States Court

of Appeals for the Ninth Circuit, which reversed our decision in *Graphic Press*. Instead, appeal of our decision herein would be taken to the United States Court of Appeals for the Second Circuit, which has also decided a case involving the same issue.

In *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), the court of appeals reviewed a decision by the United States District Court for Connecticut. On cross-motions for summary judgment, the district court had been faced with the question whether amounts received in a condemnation proceeding for disassembling, moving and reassembling machinery were part of the fair market value of the property taken and thus were amounts realized upon the conversion of property into money, or rather were a separate reimbursable item of damages for purposes of taxation. After reviewing Connecticut law on the determination of fair market value of condemned property, the district court held that the amounts attributable to the costs of moving were received by the taxpayer as part of the fair market value of the property taken. *E. R. Hitchcock Co. v. United States, supra*, 382 F.Supp. 236, 241 (D. Conn. 1974).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the decision of the district court. In so doing, that court included the following statement:

> Without relying upon the state law concept of a condemnation award including moving expense as a factor in fair market value, it is an economic fact that this taxpayer received its moving expense money solely as a result of the condemnation and as a matter of state law. Its original property was actually converted by the condemnation into a sum (or sums) of money which the taxpayer utilized, concededly, for qualified replacement property purchase. Economically and substantively, *see* Union Planters National Bank of Memphis v. United

> States, 426 F.2d 115, 118 (6th Cir.), cert. denied, 400 U.S. 827 91 S.Ct. 53, 27 L.Ed.2d 56 1970), this money received for moving expenses as part of the "amount realized" on the conversion. But for the conversion it would not have been realized. It was not just an integral part of the state award, it was to compensate the taxpayer for the property taken. To view moving expense money as a separate, unrelated payment out of the blue, so to speak, is to exalt form over substance. * * * [514 F.2d at 487.]

The court also noted that the deduction by the taxpayer of moving expenses was justified. 514 F.2d 487, n. 6.

Considering the rule of *Golsen v. Commissioner, supra*, the opinion of the court of appeals in *E. R. Hitchcock v. United States, supra*, and the facts of the instant case, we are compelled to hold that the portion of petitioner's condemnation award which was determined by reference to moving expenses constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses. Accordingly, we hold that no part of petitioner's condemnation award constitutes ordinary income to petitioner as reimbursement for moving expenses or as excess reimbursement for moving expenses, that the moving expenses of petitioner for the taxable year 1972 are fully deductible in that year, and that petitioner need not restore to income amounts that were deducted as moving expenses in the taxable years 1965 through 1971.

Respondent contends that the instant case is distinguishable from *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), in two respects. First, respondent contends that the decision in *E. R. Hitchcock Co.* involved the application of Connecticut law, whereas the instant case involves the application of New York law. Second, respondent argues that the decision in *E. R. Hitchcock Co.* resolved the taxability of

an amount equal to the difference between actual moving expenses and the portion of the condemnation award which was measured by projected moving costs, whereas the instant case must resolve the taxability of the entire portion of the condemnation award which was measured by projected moving costs. Because of those two distinctions, respondent argues that the rule of *Golsen v. Commissioner,* 54 T.C. 742 (1970), does not require us to reach the same result in this case as was reached in *E. R. Hitchcock Co.* We disagree.

There is not sufficient difference between the laws of Connecticut and New York to negate the applicability of *E. R. Hitchccock Co.* to the facts of this case. Under Connecticut law, the fixing of a condemnation award is done upon the basis of the fair market value of the property taken as of the day of the taking. See *E.R. Hitchcock Co. v. United States,* 382 F.Supp. at 238 (D. Conn. 1974). The costs of moving fixtures are not taken into account separately, but rather as an element which affects the fair market value of the property. *Harvey Textile Co. v. Hill,* 135 Conn. 686, 689, 67 A.2d 851, 852 (1949). On the other hand, under New York law, the value of fixtures is determined as being the lower of two amounts: (1) the difference between their present value in place and their salvage value; and (2) the costs of disassembling, trucking, and reassembling the fixtures. *Rose v. New York,* 24 N.Y.2d 80, 246 N.E.2d 735 (1969). Whichever amount is used, such amount becomes the value of fixtures which are removed or could be removed. Thus, as under Connecticut law, compensation is made from the value of the property taken. New York law is not different from Connecticut law in that respect; it is simply more definite than Connecticut law in the use of moving expense data. Nevertheless, in both states the

use of moving expenses is as a measure of value, and it is upon that basis that the court of appeals made its decision in *E. R. Hitchcock Co.*[4]

The factual distinction that respondent perceives between the instant case and *E. R. Hitchcock Co.* is overcome by a footnote in the opinion of the court of appeals. Respondent points out that in the instant case the Commissioner determined that the entire portion of the condemnation award which was measured by moving expenses was included in petitioner's income in the year of receipt. Respondent also notes that in *E. R. Hitchcock Co.* the central issue was the includability in income of the difference between actual moving expenses and the portion of the condemnation award which was measured by projected moving expenses. The court of appeals anticipated such a distinction by pointing out that:

> It is difficult to tell from our record whether, but we assume that, the District Director did consider that the entire amount paid was income against which a deduction for sums actually expended was allowed. This would be consistent with the general rule that the cost of moving machinery from one point to another or one part of a plant to another is an ordinary and necessary business expense, deductible under 26 U.S.C. sec. 162, Eastern Shoe Mfg. Co., 8 B.T.A. 1169 (1927);MacAdam & Foster, Inc., 8 5.C.A. 967, 1927); Addressograph-Multigraph Corp., 4 CCH Tax Ct.Mem. 147 (1945), including moving in an eminent domain context. Electric Tachometer Corp., (illegible) 158 (1961). * * * [514 F.2d at 487, fn. 6.]

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[4] Moreover, under both laws, the language used in *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), affg. 382 F.Supp. 236 (D. Conn. 1974), by the United States Court of Appeals for the Second Circuit is broad enough to qualify condemnation proceeds which are measured by moving expenses as amounts realized upon the conversion of property into money. See 514 F.2d at 487.

Respondent contends that if the decision of the United States Court of Appeals for the Second Circuit in *E. R. Hitchcock, Co.*, is applied to the instant case, then he nevertheless should prevail on alternate grounds. Respondent argues that the tax benefit rule should require the inclusion in petitioner's income of amounts which were recovered during the taxable year 1972 after being deducted in a previous taxable year. Respondent contends that amounts spent during the taxable year 1972 on moving expenses were spent with a right to reimbursement and, therefore, are not deductible. We disagree with both of the foregoing grounds.

With respect to respondent's argument under the tax benefit rule, we would point out the requirement that a taxpayer must make a recovery of an item which generated a deduction in an earlier taxable year. See sec. 111; sec. 1.111-1(a), Income Tax Regs.; *Spitalny v. United States*, 430 F.2d 195 (9th Cir. 1970). Respondent correctly points out that petitioner claimed deductions for moving expenses in taxable years prior to 1972 and that such deductions resulted in a tax saving to petitioner. However, because of our holding that all of the condemnation award is properly categorized as an amount realized from the involuntary conversion of property into money, no part of that condemnation award constitutes a recovery of prior moving expenses. Without such a recovery, respondent's argument under the tax benefit rule must fail. See sec. 1.111-1(a)(2), Income Tax Regs.

We must reach a similar result with respect to respondent's argument that amounts expended for moving expenses during the taxable year 1972 were spent with a right to reimbursement. No part of the condemnation award represents reimbursement of moving expenses. The amounts expended by petitioner for moving expenses during the taxable year 1972 are deductible. *Electric Tachometer Corp. v. Commissioner,* 37 T.C. 158 (1961).

Decision will be entered
for the petitioner.

UNITED STATES TAX COURT
Washington

Docket No. 5963-76

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of this Court as set forth in its Opinion filed July 31, 1980, it is

ORDERED and DECIDED: That there are no deficiencies in income tax due from petitioner for the taxable years and in the amounts as follows:

Taxable Year	*Deficiency in Tax*
1969	$ 2,317
1970	2,317
1971	5,792
1972	187,345

WILLIAM A. GOFFE
Judge

Entered: Jul 31, 1980

Appendix "E"—Decision of U.S. Court of Appeals—2d Circuit in Buffalo Wire vs. Commissioner, 659 F.2d 1058 (1981) (In Prior Tax Case Affirming Tax Court Decision)

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the twenty-eighth day of April, One Thousand Nine Hundred and Eighty-One.

Present: Honorable Walter R. Mansfield,
Honorable Ellsworth A. Van Graafeiland,
Circuit Judges.
Honorable Bernard Newman,
Judge, U.S. Court of International Trade

Dkt. No. 80-4224

BUFFALO WIRE WORKS COMPANY, INC.,
Appellee,

against

COMMISSIONER OF INTERNAL REVENUE,
Appellant.

United States Court of Appeals
Second Circuit
Filed
Apr 28 1981
(Illegible), Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

The Commissioner of Internal Revenue appeals from a decision of the United States Tax Court (Goffe, J.) entered on July 31, 1980, holding that there were no income tax deficiencies due from Buffalo Wire Works Co. on a 1972 award upon the involuntary condemnation of its plant by the City of Buffalo.

The Commissioner contends that the taxpayer should have included as ordinary income the recovery of a sum measured by moving expenses rather than as an amount paid for loss in value of the taxpayer's property and therefore entitled to non-recognition as gain within the meaning of §1033 of the Internal Revenue Code of 1954, 26 U.S.C. §1033. After a careful examination of the record, briefs and oral argument, we disagree, substantially for the reasons stated by Judge Goffe in his opinion. The $430,162 awarded the taxpayer by the City of Buffalo was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash. *E. R. Hitchcock Co. v. United States,* 514 F.2d 484, 487 (2d Cir. 1975). Under New York law this method of valuation may be adopted where it is smaller than the amount which would be arrived at by deducting salvage value from the present value of the fixtures in place, which in this case would have resulted in an award of $976,813. *Rose v. New York,* 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1968).

The decision of the Tax Court is affirmed.

WALTER R. MANSFIELD
U.S.C.J.
ELLSWORTH A. VAN GRAAFEILAND
U.S.C.J.
BERNARD NEWMAN
Judge, U.S. Court of International Trade

(2)

Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-52

IN THE

Supreme Court of the United States

October Term, 1988

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing and Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the Court of Appeals for the Second Circuit err in affirming the opinion of the District Court which found that HUD reasonably determined that Petitioner had received, in state condemnation proceedings, a sum that had substantially the same purpose and effect as a payment for moving expenses under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970?

2. Did the Court of Appeals for the Second Circuit err in affirming the ruling of the District Court which held that a prior Tax Court decision, which had been affirmed by the Second Circuit, had no collateral estoppel effect on the instant case because the issue involved in the tax litigation was different from the issue involved under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970?

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-52

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing and Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Buffalo Urban Renewal Agency, City of Buffalo and James D. Griffin respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court

of Appeals for the Second Circuit in this case. The Court of Appeals, in affirming without a written opinion the decision of the District Court, for substantially the reasons stated in the District Court's decision, correctly ruled that (1) HUD reasonably determined that Petitioner, whose property was condemned pursuant to the provisions of New York State condemnation law, was not entitled to an award of moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §4601 *et seq.*) (hereinafter, the "Act") because Petitioner had received as part of its condemnation award sums having substantially the same purpose and effect as a payment for moving expenses under the Act and that (2) a prior Tax Court decision, affirmed by the Court of Appeals, had no collateral estoppel effect on this action because the Tax Court case concerned issues different from those contested in this action.

I. Statement of the Case

Respondents Buffalo Urban Renewal Agency (BURA), City of Buffalo and James D. Griffin set forth the salient facts of this case, some of which do not appear in the Petition For a Writ of Certiorari.[1]

On April 25, 1985, Petitioner Buffalo Wire Works Company, Inc. filed an action in the United States District Court for the Western District of New York. The complaint requested judicial review of a decision of February 26, 1985, by the United States Department of Housing and Urban Development (HUD) which upheld a prior BURA decision denying Petitioner's claims under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the "Act"). BURA and the City of Buffalo were each named in the complaint as the "state agency" responsible for rejection of Petitioner's claims for Federal relocation benefits.

In the District Court, Petitioner sought a total relocation payment of $434,557.77 for "moving expenses", including costs of searching for replacement property, which costs were incurred during the time period of approximately *1956* to early *1973*.

Petitioner's claims relate to the condemnation, in *1967*, of the original Buffalo Wire Works plant in the Waterfront District of the City of Buffalo. Petitioner subsequently moved to its present location at 1165 Clinton Street in Buffalo in March, 1972.

Lengthy condemnation proceedings occurred in New York State Supreme Court, Erie County during the years 1968 through 1972, resulting in that court setting the fair value of Petitioner's land, buildings *and fixtures*

[1] This statement of facts is drawn primarily from the opinion of the District Court, set forth in the Appendix to the Petition for Writ of Certiorari.

pursuant to New York Eminent Domain Law. The state court determined the value of removable fixtures pursuant to the formula prescribed by *Rose v. New York,* 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969): First, determine two values: (1) the difference between salvage value of the item and present value in place (reproduction cost less depreciation) and (2) *the actual or contemplated costs of disassembling, trucking and reassembling the item at a new location, i.e.* moving costs. The claimant is entitled to the lesser of the two values.

The state court set the first figure, salvage value less present value in place, at $976,813.00. The Court *estimated moving expenses* (because Appellant had *not* yet moved), including "costs of disassembling, trucking, reassembling *and relocation generally*" as follows:

CATEGORY	*AMOUNT*
Motorization and Electrical Preparation of Machinery	$ 19,165.00
Engineering Services	80,718.00
Pneumatic Disconnect and Reconnect	11,101.85
Water Disconnect and Reconnect	516.00
Electrical Disconnect and Reconnect	12,871.02
Wall Openings	Included in Rigger's Estimate
Rigging and Trucking	274,229.00
Moving Raw Materials, etc.	39,750.00
Additional Engineering Service	Included in Rigger's Estimate
Business Interruption, etc.	None
Warehousing	None
Realignment and Rework	39,394.00
Additional Allowance	3,000.00
	480,774.87

Having previously determined the land and buildings values, the state court awarded the following sums:

Value of Land	195,000.00
Value of Buildings	440,000.00
Moving, etc.	480,744.87
Total Award	1,115,744.87

A. Petitioner's Administrative Claims (1972-1974).

Petitioner's initial claim in this matter was made to BURA in *1972.* At a hearing in May 1974, Petitioner demanded total relocation expenses under the Act of approximately $130,050. Approximately $125,000 of that amount consisted of attorney's fees ($114,107.00) and appraisal and witness fees ($11,012.00). At the conclusion of the hearing, Petitioner requested the opportunity to submit legal authority on two specific issues in its claim: attorney's fees and appraisal and witness fees. Petitioner never submitted such authority and no hearing decision ever issued.

B. Petitioner's First Federal Court Action (1973-1975).

Petitioner brought an action in the District Court for the Western District of New York (Civ. No. 1973-43) in *1973* seeking to enforce its rights under the Act. In that action, Petitioner sought essentially the same amounts it sought in its concurrent administrative claim, *i.e.* approximately $130,000, primarily consisting of attorney's fees and appraisal and witness fees. That action was dismissed by the District Court on September 9, 1975 for Petitioner's failure to prosecute it.

C. Administrative (1983-84)/Federal Court 1985.

Not until January 1983, ten years later, did Petitioner claim to be entitled to relocation payments related to the Clinton Street move, despite the fact that all of the

Clinton Street moving expenses had been incurred by mid-1973.

In its submission of January 17, 1983, cast as a "restatement of claim," Petitioner claimed completely new amounts:

Actual moving expenses to 1135 Clinton Street	$279,266.85
Expenses of abandoned move to West Seneca (also called search expenses)	138,784.53
Pre-1965 moving expenses	6,093.39
Pre-1972 moving expenses	10,413.00
Total Relocation Costs	$434,557.77

Absent from the 1983 claims were requests for attorney's fees; added were approximately $413,000 in relocation costs *never before presented to BURA,* even though all the costs were incurred no later than early *1973.*

A comparision between the amounts claimed in 1972-74 and in 1983 follows:

	1972-74 Claims and First Federal Court Claims	*1983 Claims (incurred by mid-1973) and Second Federal Court Claims*
Cost of moving personal property	$ 1,605.00	$295,773.24
Search expenses	9,153.18	138,784.53
Attorney's fees	114,107.00	-0-
Appraisal and witness fees	11,012.00	-0-
Total	$135,877.18	$434,557.77

BURA denied this claim on April 9, 1984, which denial was upheld by HUD on February 26, 1985. Petitioner then again filed suit in the District Court.

D. The District Court Decision.

On November 5, 1987, the District Court, ruling on cross motions for summary judgment, found that the HUD decision rejecting Petitioner's claims was supported by substantial evidence and awarded Respondents summary judgment, dismissing Petitioner's claims. As to the search expenses, the Court upheld HUD's rejection of Petitioner's claim based on laches.[2] As to moving costs, the District Court found that HUD's primary rationale for rejecting the moving expense claims, that any payments under the Act would essentially duplicate amounts already received by Petitioner in the state condemnation award, was reasonable and supported by substantial evidence appearing in the record. It found that "the $480,744.87 state condemnation award paid [Petitioner] $201,748.02 *more* than [Petitioner's] actual moving expenses." (Emphasis in original).

The Court of Appeals for the Second Circuit affirmed, without written decision, the District Court's decision "for substantially the reasons set forth in [the District Court's] decision." Petitioner raises no challenge to the rejection of its claims for search expenses. The Petition is limited to the issue of moving expenses under the Act.

---

[2] The Court held that Petitioner had been guilty of laches in the submission of not only the amount it would claim for search expenses under the Act but also the documentation to support characterization of its expenses as search expenses.

II. Summary of Argument

The Court of Appeals for the Second Circuit correctly affirmed the decision of the District Court. The District Court granted summary judgment to Respondents, holding that HUD and BURA had acted reasonably in determining that Petitioner had received in state court condemnation proceedings sums which had the same purpose and effect as would payments under the Uniform Relocation and Real Properties Acquisition Policies Act of 1970 and thus that Petitioner was not entitled to receive further sums. The District Court also determined that a prior tax court proceeding involving Petitioner had no collateral estoppel effect on this action because the tax court proceeding dealt with an issue different from the issue in this action.

No important question of Federal law is presented in the Petition. This case presents a question of agency review which draws on well-settled standards which were properly applied by the Court of Appeals. The Act sets forth a clear standard for comparing sums received under State condemnation law and those available under the Act. Petitioner has failed to demonstrate that HUD, in finding that Petitioner is ineligible to receive moving expenses under the Act because it received sums under state condemnation law having the same purpose and effect as moving expenses available under the Act, was arbitrary or capricious, abused its discretion or otherwise failed to act in accordance with law.

Further, Petitioner has demonstrated no real conflict between the case below and decisions of this Court or appellate courts, including the Second Circuit, on the application of the doctrine of collateral estoppel. That doctrine does not apply in this action because the issue in the tax court litigation, *i.e.*, the treatment, for purposes of the Federal income tax law, of funds received as a result of state court condemnation proceedings, is different from the issue in this action, *i.e.*, whether the funds received in the state court condemnation actions have the same purpose and effect as funds available for moving expenses under the Act.

In neither of its reasons advanced in its Petition has Petitioner set forth compelling grounds for this Court to exercise its discretion to grant Petitioner's request for a Writ of Certiorari.

III. ARGUMENT

POINT I

The Court of Appeals and the District Court correctly applied the appropriate standard in upholding HUD's decision.

In a nutshell, what Petitioner seeks is a double recovery. Petitioner wants to have its fixtures treated for state law purposes and for Federal income tax purposes as if the fixtures were lost and subject to cash reimbursement; yet, in the same breath, it wants the same equipment and machinery to be treated as uncompensated personalty for purposes of receiving a Federal moving expense relocation payment.

Put another way, Petitioner would have this Court believe that it should receive two payments: one from the City of Buffalo as if the fixtures were involuntarily converted; the second from the Federal government as if no portion of the fixtures were converted.

Regardless of whether the payments to Petitioner in the state court condemnation action are called "payments for moving expenses" or "payment for property involuntarily converted," the maximum cap on such payments still remains the cost of moving the fixtures. Any Federal payment that would give Petitioner an amount in excess of the cost of moving would be duplicative of the condemnation award for fixtures and not permissible under the Act.

The Act mandates that displaced individuals and businesses will not obtain duplicate Federal payments for relocation assistance already received through state law:

> No payment or assistance under section 4630 or 4655 of this Title shall be required or included as a program or project cost under this section, if the

> displaced person receives a payment required by the state law of eminent domain *which is determined by such Federal agency head to have substantially the same purpose and effect as such payment under this section, and to be part of the costs of the program or project for which Federal financial assistance is available.*

42 U.S.C. §4631(b) (emphasis added).

This provision duplicates §211(b) of the original Act, in effect in 1972. *See* P.L. 91-646; 84 Stat. 1894 at 1900. See also 24 C.F.R. §42.7 (1973).

HUD found that Petitioner received, as part of its state condemnation award, sums having substantially the same purpose and effect as moving expenses authorized by the Act. Therefore, HUD found Petitioner not entitled to moving expenses under the Act. The District Court and the Second Circuit found this determination to be supported by law and substantial evidence.

A. Displaced businesses' entitlement under the Act.

Section 4622 of the Act provides that the head of a state agency receiving Federal financial assistance for a project shall make a payment to displaced persons, upon proper application, for

> (1) Actual reasonable expenses in moving . . . [a] business, . . . or other personal property;
>
> (2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business . . ., *but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property,* as determined by the head of the agency; and

> (3) Actual reasonable expenses in searching for a replacement business . . . .

42 U.S.C. §4622 (emphasis added). *See also* P.L. 94-646; §202(a); 84 Stat. 1895.

Therefore, a displaced person is *ineligible* to receive any amount in excess of "the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency." 42 U.S.C. §4622, 4631(b).

The House of Representatives, in its legislative report recommending passage of the Act in 1971, anticipated that payments would be made under the Act for direct loss of property, but only up to the value-in-place of the property, and *never to exceed the cost of relocating the property*:

> A person displaced from a business or farm operation may be compensated for actual direct property losses, whether he discontinues, or reestablishes his operation. *However, the maximum amount of any such payment may not exceed the reasonable expenses that would have been required to relocate the property and, in the case of heavy machinery, equipment or other property involving substantial sums, also should not exceed the in-place value of the property.*

H.R. Rep. No. 91-1656, 92d Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5850, 5856 (emphasis added).

The regulations governing the implementation of the Act, 24 C.F.R. 42.1, incorporate the guidelines originally issued by HUD via its Transmittal Notice 1371.1 chg. 1, dated October 29, 1971, and list the criteria to be used by state agencies in evaluating claims for relocation benefits.

B. Plaintiff's entitlement under New York Eminent Domain Law.

The guidelines implementing Sections 4622 and 4631(b) of the Act are identical to the criteria established by New York condemnation law for valuing fixtures which are removed or could be removed from condemned property.

The New York criteria were formulated in *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969). In that condemnation case, the New York Court of Appeals ruled that fixtures, which are or could be removed from property taken by eminent domain, must be separately valued in a fashion different from the land and buildings.

As nearly as possible, the owner of the fixtures is to be placed in the same position as he was before the taking, but not in a better financial or operating position. The theory, of course, is that the state is only required to provide just compensation. *Rose*, 24 N.Y.2d at 90, 298 N.Y.S.2d at 978.

In a condemnation proceeding, the fixtures to be moved are valued according to two criteria:

> (1) The differences between the salvage value of the item and the present value of the item in-place; and
>
> (2) The actual or contemplated costs of disassembling, trucking and reassembling the items at a new location, *i.e.*, moving expenses.

Id. at 88, 298 N.Y.S.2d at 976-77.

If the cost of moving is less than the difference between the salvage value and present value in-place, the cost of moving is all the claimant is entitled to recover.

Id. The claimant, however, *retains* the fixtures, a factor which Petitioner tends to ignore. In fact, Petitioner makes the baseless and illogical argument:

> "a displaced person in [Petitioner's] position who chooses to abandon its fixtures is in a substantially better position than one who causes to relocate."

(Petition, at 24).

Much ink has been spilled by both parties in this litigation in an effort to characterize the nature of the payment made to Petitioner in the state court condemnation action, on the theory that the "correct" characterization will determine whether Petitioner's entitlement under the Act has already been satisfied by state law. Petitioner relies on the *Rose* case, but the facts and rationale of that case support HUD's determination that Petitioner is entitled to no more than what it received from the City of Buffalo.

Plaintiff Rose owned two corporations whose businesses were condemned by New York State. The second corporation wished to relocate two machines from the condemned plant site to its new installation. 24 N.Y.2d at 82-84, 298 N.Y.S.2d at 971-73.

The New York Court of Claims had awarded no sums in compensation for the value of these two machines, treating them as personalty. The New York Court of Appeals determined that it would be unfair to characterize these two machines as personalty (and therefore ineligible for any eminent domain compensation) since the machines could be moved normally only at inordinate expense. However, the court also realized that the owner would receive a windfall if the state allowed the corporation to keep the machines

and at the same time be compensated for their total loss as if the machines had been destroyed or retained by the state:

> The claimant is only to be placed in the same position as he was before the taking, not in a better financial or operating position because of the taking to the detriment of the state which is only required to make just compensation.

24 N.Y.2d at 90, 298 N.Y.S.2d at 978.

The *Rose* court, in order to provide additional compensation for movable fixtures over and above the statutory amount allowed for personalty, allowed the owner to receive a payment for the fixtures' value lost because of the condemnation, but set a maximum limit on that amount (no more than the cost of moving) to prevent the owner from receiving a windfall as a result of the condemnation. The *Rose* criteria resulted from the court's efforts to decide the appropriate compensation to be paid by the state for fixtures, like the two machines, which were located on condemned property, but could "be profitably removed to another location and used by the owner." *Id.* at 86, 298 N.Y.S.2d at 974-5.

Petitioner has admitted that it opted to remove its fixtures from the waterfront property and so notified the state court. Petition, at 5.

Petitioner focuses on the question: did the condemnation award from the City of Buffalo for fixtures (capped at the cost of moving) constitute a payment for loss of property or a payment for moving expenses? Interestingly, the *Rose* case labelled the payment "reasonable moving fees". *Id.* at 90, 298 N.Y.S.2d at 978. The United States Tax Court and the Second Circuit in the Buffalo Wire Works Tax Court litigation characterized the payment, for income tax purposes, as

an "amount realized from the involuntary conversion of property into money" rather than reimbursement for moving expenses. *Buffalo Wire Works v. Commissioner*, 74 T.C. at 937. In *E.R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), cited as controlling authority in the Buffalo Wire Works Tax Court decision, the Second Circuit called such payments "severance damages" and "*an amount attributed to moving expenses paid as a part of the award on condemnation*" and acknowledged that the payments were made to compensate the taxpayer for property taken. *Id.* at 486 (emphasis added).

The point is that the amount eventually received by Petitioner for the fixtures, $480,744.87, was *equivalent to* the projected cost of moving the fixtures to West Seneca, since that amount was less than the salvage value of the fixtures less depreciation. The City of Buffalo, in effect, compensated Petitioner as if it forced a sale of the fixtures, irrespective of whether Petitioner eventually kept the fixtures.

Thus, after February 15, 1972 Petitioner was free to keep and move the fixtures despite its receiving compensation for them, but it was not entitled to receive a double recovery under the Act. In fact, the amount Petitioner received far exceeded (by over $200,000) the actual cost of the move to Clinton Street.

In analyzing Petitioner's contentions, it must be kept in mind that "relocation payments" under the Act are defined to include:

> 1. *Actual reasonable expenses in moving* himself, his family, business, farm operation or other personal property;

> 2. *Actual direct losses of tangible personal property as a result of moving* or discontinuing of business or farm operation, *but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency*; . . . .

42 U.S.C. §4622(a) (emphasis added).

Even if we assume, for the sake of argument, that Petitioner did in fact receive a payment from the City on the theory that its movable fixtures had been involuntarily converted into money (or lost and reimbursed), such a payment still includes the equivalent of a relocation payment for "actual direct losses of tangible personal property as a result of moving or discontinuing of business . . . but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property . . . ." 42 U.S.C. §4622(a)(2). The *Rose* formula is thus congruent with the Act's direct payment loss formula.

The Act is crystal clear that *even when fixtures are completely liquidated and left at the old facility, the maximum Federal relocation payment can never exceed the cost of moving those same fixtures.* 42 U.S.C. §4622(a)(2). How much more so, then, when fixtures are moved and kept by the owner, should the relocation payment be capped at the cost of moving!

C. Petitioner received a payment pursuant to state law more than equal to the reasonable cost of relocating its fixtures.

None of the Respondents claim that Petitioner ever received an award from the City to *reimburse* it for *actual* moving costs. However, as the District Court correctly pointed out:

> . . . it is a different question whether [the state court award of $480,744.87] has "substantially the same purpose or effect as a payment of actual moving expenses." There is certainly no question that the [state court] award was *for* moving expenses, as reflected in the itemized description [of the state court condemnation award].

(Emphasis in original).

HUD correctly determined under the Act that Petitioner's condemnation award was the substantial equivalent of any relocation payment it might have been entitled to under the Act.

The District Court correctly found HUD's reasoning and analysis to be reasonable based on the record. The Court of Appeals' affirmance of the District Court should not be disturbed.

POINT II

The prior Tax Court case has no preclusive effect on the issue of Appellant's eligibility for federal relocation benefits.

Petitioner argues that the Tax Court's description of the condemnation award precludes, under the doctrine of collateral estoppel, finding that Petitioner received a payment substantially duplicative of a relocation payment under the Act. The Tax Court case has no such effect.

Petitioner's characterization of the issues before the United States Tax Court and the Second Circuit in *Buffalo Wire Works, Inc. vs. Commissioner of Internal Revenue,* 659 F.2d 1058 (1981) [affirming 74 T.C. 925 (1980)] is simply incorrect. A close examination of the Tax Court decision and its precedents confirms that it is limited in scope and perfectly consistent with the decisions of HUD, the District Court and the Second Circuit in this action.

At issue in the Tax Court proceeding was section 1033 of the Internal Revenue Code which is a "relief provision enacted to allow a taxpayer to replace property involuntarily converted without paying the capital gains tax incident to other exchanges of property . . . and is to be construed liberally to achieve its purpose." *E.R. Hitchcock Co. vs. United States,* 514 F.2d at 486, citing *John Richard Corporation,* 46 T.C. 41, 44 (1966).

On its 1972 tax return, Petitioner elected under Section 1033 to recognize the gain from the involuntary conversion of its waterfront property only to the extent that the amount realized upon the conversion exceeded the cost of the Clinton Street replacement property.

Because Petitioner spent more for its replacement property than it received in the condemnation action, it reported no gain.

Petitioner had also claimed "moving expense" deductions in 1972 and in prior years over and above the $1,060,734.00 it paid for the replacement property.

The IRS argued that Petitioner was required to report as ordinary income an amount equivalent to all of the prior moving expense deductions, part as reimbursement for moving expenses and part as excess reimbursement for moving expenses. The term "moving expenses" here refers to the amounts for which moving expense deductions had already been taken. The IRS claimed that Petitioner could use section 1033 to claim non-recognition of gain only for the portion of the condemnation award that exceeded the prior years' moving expense deductions.

The Tax Court and the Second Circuit overruled the IRS and allowed Petitioner to claim non-recognition of gain under section 1033 for both the "land and building" and the "fixtures, etc." portions of the condemnation award, citing two cases as controlling authority, *Hitchcock v. United States, supra* and *Graphic Press Inc. vs. Commissioner,* 523 F.2d 585 (9th Cir. 1975), reversing 60 T.C. 674 (1973).

In *Hitchcock,* the Second Circuit treated "an *amount attributed to moving expenses paid as a part of the award on condemnation*" as eligible for section 1033 treatment. 514 F. 2d at 486 (emphasis added). Contrary to Petitioner's arguments, the Second Circuit made its decision in *Hitchcock* "[w]ithout relying on the state law concept of a condemnation award including moving expense as a factor in fair market value", but instead

because "it is an economic fact that this taxpayer received moving expense money solely as a result of the condemnation and as a matter of State law." *Id.* at 487.

In the *Graphic Press* case, the Ninth Circuit put it another way:

> We believe compensation in excess of land and building payments in this case qualifies for section 1033 treatment. From the taxpayer's viewpoint, he is being compensated for a loss due to the condemnation of his property. Whatever payment the taxpayer receives is attributable to the involuntary conversion. *Where, as here, a payment is made for relocation costs in addition to land and building costs,* as long as the condemnee reinvests the total award into other property similar or related in service or use within the statutory period, both the language and the spirit of the statute have been met.

523 F.2d at 589 (emphasis added).

The above quotations from the *Hitchcock* and *Graphic Press* cases pinpoint exactly what Petitioner received in the State action: an "amount attributed to moving expenses paid as part of the award on condemnation" and "payment . . . for relocation costs in addition to land and building costs." These amounts are precisely what Petitioner would be entitled to under the Act. Thus, Petitioner is not entitled to an award under the Act since it already received funds equivalent to and with the same purpose and effect as a relocation payment.

The District Court below correctly determined that the treatment of a condemnation award under I.R.C. §1033 is an entirely different issue from the question of equivalency under §4631(b) of the Act:

> . . . the holding [of the Tax Court decision] is a narrow one, not apposite to the issue before HUD. [The Tax Court decision] is only concerned with the

> tax identity of the money received by plaintiff for "moving, etc." in the State condemnation award. For Federal tax purposes, there is a categorical distinction, a difference in income, between payment received for an involuntary conversion of property into money, and payment received for moving expenses. But for purposes of the issue before HUD, that distinction is immaterial. There is no necessary incompatibility between the holding in [the Tax Court] that [Petitioner's] payment was an involuntary conversion of property into money and HUD's finding that [Petitioner's] payment had substantially the same purpose or effect as the payment for actual reasonable moving expenses. *Put simply.* [*Petitioner*] *may have received payment having the same purpose or effect as actual moving expenses as part of an involuntary conversion of property into money.*

(Emphasis added).

It is a long-settled principle of tax law that the application of the Internal Revenue Code need not be *in pari materia* with economic reality, other laws or statutes. For example, income for tax purposes is to be determined by the tax statute and not under accounting principles. 1 Martens, *Law of Federal Income Taxation,* Section 5.03 (1985); *Gulf Power Company,* 10 T.C. 852 (1948) (accounting rules and practices required by a public utility for Federal Power Commission purposes are not controlling on tax questions).

The income tax laws do not profess to embody perfect economic theory. *Weiss v. Weiner,* 279 U.S. 333 (1929); *Fraser v. Commissioner,* 25 F.2d 653, 655 (2d Cir. 1928) ("Some gross accommodation to the economic reality is all that is demanded; it is not fatal that the fit is not perfect.")

For example, the definition of "gift" for purposes of the income tax code have been held not to be *in pari materia* with either the estate tax law or the gift tax statute. *Galt v. Commissioner,* 216 F.2d 41 (7th Cir. 1954), *cert. denied* 348 U.S. 951 (1955); *Farid-Es-Sultaneh v. Commissioner,* 160 F.2d 812 (2d Cir. 1947).

Different public policies often mandate different treatment of what on the surface seem to be the same concepts for purposes of different Federal laws. *See,* for example, the definition of "wine" for purposes of the Revenue Act of 1918 and the Federal Alcohol Administration Act in *Sterling Cider Company v. Hassett,* 133 F.2d 590, 593 (1st Cir. 1943) and the uses of the terms "seamen," "bargeman" and "crew" in the Social Security Act and Long Shoreman's and Harbor Workers Compensation Act in *Berwind-White Coal Mining Company v. Rothensies,* 137 F.2d 60 (3d Cir. 1943).

In *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.,* 404 F.2d 804 (1968) *cert. denied* 393 U.S. 1093 (1969), the District of Columbia Circuit refused to treat a Federal Maritime Commission ruling that defendants' activities had no effect on United States "foreign commerce" as a bar to a determination that the same activities restrained "foreign commerce" for purposes of the Sherman Act:

> It is commonplace in the law to encounter instances of the same words being given different scope in different contexts . . . Accordingly, defendants cannot bootstrap the Commission's determination into a preclusive ruling on whether foreign commerce was restrained under Sherman Act standards.

404 F.2d at 810-11.

Petitioner's Tax Court litigation against the United States as tax imposer and collector concerned the tax treatment of the condemnation award under §1033 of the Federal Tax Code. *It did not concern whether Petitioner was entitled to receive relocation payments or their equivalent from the United States acting as regulator.*

Lastly, this Court should be aware of another point which Petitioner ignores.[3] The treatment, for tax purposes, of its condemnation award, under the Tax Court and Second Circuit rulings is identical to the tax treatment provided by the Act to moving expense awards:

> No payment received under [the Act] shall be considered as income for purposes of Title 26, . . . or any other Federal Law."

42 U.S.C. §4636.

[3] In fact, the Petition at p. 21 infers that the opposite is true.

POINT III

Petitioner has failed to demonstrate that an important question of Federal Law is at issue in this case.

In a desperate effort to encourage this Court to grant its petition, Petitioner has attempted to show that an important question of Federal Law is at issue. Petitioner argues that HUD has "failed to set forth any guidance with respect to, and [has] basically ignored" New York condemnation law and its relationship with the Act. Petition, at 21. As a result, Petitioner claims that (1) future displaced persons are left without guidance and (2) displaced persons will not be treated uniformly in accordance with the goals of the Act. *Id.* at 22-23.

As to the alleged failure of HUD to set forth guidance or standards, Petitioner misses the mark. The standard to be applied is supplied by the Act itself, *i.e.*, whether the State condemnation award, or a portion thereof, is the substantial equivalent of a payment for moving expenses under the Act. The HUD decision does cite the state condemnation award decision and the *Rose* standards.

The standard Petitioner should address, but does not, is the proper standard of review of an agency action. The permissible scope of judicial review of agency action is extremely limited; the presumption exists that agency action interpreting and applying its own rules are valid. *Udall v. Tallman*, 380 U.S. 1 (1965); *Rochester Telephone Corporation v. United States*, 307 U.S. 125 (1939). *See also Ethyl Corporation v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*), *cert. denied* 426 U.S. 941. The burden is on the party challenging the agency. *Maryland-National Capital Park and Planning Commission v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

An agency decision must be upheld unless it is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. §706(2)(A-C); *Nagi v. United States*, 751 F.2d 826, 828 (6th Cir. 1985) (applying Uniform Relocation Act); *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975) *cert. denied* 424 U.S. 965 (1976); *Richardson v. Simon*, 420 F. Supp. 916, 918 (E.D.N.Y.) *aff'd* 560 F.2d 500 (2d Cir. 1977), appeal dismissed 435 U.S. 939; *Starke v. HUD*, 454 F. Supp. 477, 483 (W.D. Okla. 1976) (applying Uniform Relocation Act).

In reviewing agency action, this Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.")

As outlined in Point I, *supra*, the District Court applied the appropriate standards in upholding HUD's decision that the condemnation award had the same purpose and effect as would a relocation payment under the Act. The Court of Appeals' affirmance thus was proper.

IV. Conclusion

This case does not raise an important issue under Federal law regarding the application or interpretation of the Uniform Relocation and Real Property Acquisitions Policies Act of 1970. The Court below properly applied the standards involving review of agency decisions.

Nor does this case raise an important question regarding the applicability of the doctrine of collateral estoppel. Prior tax court litigation involving Petitioner dealt with an issue under Federal tax law. This case involves the interplay between state condemnation law and the Uniform Relocation Act. The Petition for Certiorari should thus be denied.

Dated: August 5, 1988
Buffalo, New York

Respectfully submitted,

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(3)

No. 88-52

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In the Supreme Court of the United States

OCTOBER TERM, 1988

BUFFALO WIRE WORKS COMPANY, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to payment for moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, after having received such expenses in a New York condemnation proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) and the opinion of the district court (Pet. App. 3a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. The petition for a writ of certiorari was filed on July 8, 1988, and was served on the United States on July 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks payment under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* (Relocation Act), which pro-

vides that federal agencies shall pay a person displaced by the acquisition of real property for a federal program or project the "actual reasonable expenses in moving * * * his * * * business" (42 U.S.C. 4622). Such payment is not required, however, "if the displaced person receives a payment required by the State law of eminent domain which is determined by [the] agency head to have substantially the same purpose and effect" as the federal payment sought (42 U.S.C. 4631(b)).

1. In 1972, petitioner moved its business after the City of Buffalo, New York acquired its property by means of eminent domain for a waterfront redevelopment project that was part of a federally assisted urban renewal program. After a condemnation proceeding conducted by the state supreme court, petitioner was awarded a total of $1,115,744.87 for the value of its land, building and movable fixtures.

Under New York law, the value of movable fixtures in a condemnation proceeding is established as the lesser of (1) "the difference between salvage value of such item[s] and [their] present value in place (*i.e.*, reproduction cost less depreciation)"; or (2) "the actual and contemplated costs of disassembling, trucking and reassembling [such items]." *Rose* v. *New York*, 24 N.Y.2d 80, 88, 246 N.E.2d 735, 298 N.Y.S.2d 968, 976-977 (1968). A New York condemnation proceeding is not intended "to place a claimant in a better position than he was before the taking by helping him to finance a new facility" (24 N.Y.2d at 88, 298 N.Y.S.2d at 977). Thus, "[i]f the cost of removal is less than the difference between salvage value and present value in place, that is all the claimant is entitled to recover" (*ibid.*).

In petitioner's case, the cost of moving its fixtures to a proposed site in West Seneca, N.Y., was estimated to be $480,744.87, which was less than the present value in place of the fixtures minus their salvage value, which the court determined to be $976,813 (see Pet. App. 7a.) The court

accordingly awarded petitioner the cost of moving the fixtures rather than their value in place minus salvage (see *ibid.*). The court expressly stated that its award to petitioner for moving its fixtures was for "the costs of disassembling, trucking, reassembling, and relocation generally" (*id.* at 24a), and included the costs of "motorization and electrical preparation of machines," "engineering," "pneumatic * * * water * * * [and] electrical disconnect and reconnect," "rigging and trucking," "moving raw materials, etc." and "realignment and rework" (*id.* at 25a). Petitioner subsequently found it possible to relocate elsewhere within the City of Buffalo, and the actual expenses of moving its fixtures amounted to only $279,266.85 (*id.* at 21a).

2. Petitioner subsequently filed a claim under the Relocation Act with the Buffalo Urban Redevelopment Agency ("BURA") for $1,605 for the "cost of moving personal property," and also sought $9,153.18 reimbursement for "search expenses," $114,107.25 for "attorney's fees," and $10,973.74 for "appraisal and witness fees" (Pet. App. 7a). After its claim had been preliminarily denied, petitioner failed to pursue the proceedings before the BURA for more than eight years (*id.* at 9a).

In the interim, petitioner defended itself against a claim by the Internal Revenue Service that the moving expenses received in the condemnation proceeding were taxable as ordinary income (see Pet. App. 9a-10a). In petitioner's tax litigation, the United States Tax Court determined that, "for purposes of Federal income taxation" (*id.* at 45a), "the portion of petitioner's condemnation award which was determined by reference to moving expenses constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses," and thus was not taxable as or-

dinary income (*id.* at 49a). The Second Circuit, in an unpublished opinion, affirmed the Tax Court's disposition of the issue "for the reasons stated by" the Tax Court, finding that the disputed portion of the condemnation award "was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash" (*id.* at 56a).

3. Nearly two years after the Second Circuit's disposition of the tax claim, petitioner filed a "Restatement" of its Relocation Act claim before BURA "in light of" the tax decisions (see Pet. App. 10a) seeking a greatly increased total of $295,773.24 in "moving expenses," and $138,784.53 in "search expenses" (see *id.* at 11a). BURA denied petitioner's Relocation Act claims because of laches, noting that petitioner's restated claims were "decidedly different" from its original claims (see *id.* at 12a). The Department of Housing and Urban Development ("HUD") upheld BURA's negative determination on the grounds that petitioner's claim for search expenses was unreasonably delayed (*id.* at 30a) and that petitioner "was paid for his moving expense" in the New York condemnation proceeding (*id.* at 26a).

The district court affirmed HUD's decision, upholding the dismissal of petitioner's claim for search expenses on the grounds of laches (Pet. App. 15a) and finding that the claim for moving expenses had already been paid in the condemnation proceeding (*id.* at 21a). The court stated that, "as reflected by the itemized description" of the state condemnation award, "[t]here is certainly no question" that the relevant portion of the condemnation award "was *for* moving expenses" (*ibid.* (emphasis in original)). The court rejected petitioner's argument that in resolving the Relocation Act claim, HUD was bound by the decision of the Tax Court that the condemnation payment did not constitute reimbursement for moving expenses. The court

held that there was "no necessary incompatibility between the [Tax Court] holding * * * and HUD's finding that [petitioner's] payment had substantially the same purpose or effect as a payment for actual reasonable moving expenses," since petitioner "may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money" (*id.* at 19a (emphasis in original))). The Second Circuit affirmed in an unpublished memorandum "for substantially the reasons set forth" in the district court's opinion (*id.* at 2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner primarily contends that since the Tax Court and the Second Circuit had decided that petitioner's condemnation award did not constitute reimbursement for moving expenses for federal income tax purposes, HUD was collaterally estopped from determining that the condemnation payment was for moving expenses within the meaning of the Relocation Act (see Pet. 7-19). As petitioner correctly recognizes (Pet. 9), however, in order for collateral estoppel to be imposed upon the federal government, the issues presented by the present case must be "in substance the same as those resolved" in the earlier litigation. See *Montana* v. *United States*, 440 U.S. 147, 155 (1979). In this case, this critical threshold requirement is not satisfied. Quite simply, the Tax Court's holding that "for purposes of federal income taxation" (Pet. App. 45a), the disputed portion of petitioner's condemnation payment was not subject to treatment as ordinary income as

moving expenses but rather constituted an involuntary conversion of property into money did not preclude HUD's finding that the payment was for moving expenses under the Relocation Act.

Section 1033 of the Internal Revenue Code (26 U.S.C.) provides that, for federal income tax purposes, no gain is recognized where property is involuntarily converted into money so long as the taxpayer purchases similar property of equal or greater value to that converted within a specified period of time. To determine whether the payment received by petitioner is subject to nonrecognition of gain under Section 1033, the characterization of the payment as moving expenses is irrelevant; it is only necessary to determine whether the payment had been received as a result of an involuntary conversion. As the Second Circuit held in *E.R. Hitchcock Co.* v. *United States,* 514 F.2d 484 (1975), Section 1033 applies to defer recognition of the entire amount received in a condemnation proceeding, even though the condemnation award in that case concededly took account of the taxpayer's moving expenses (see 514 F.2d at 486-487). The court of appeals stated:

> [I]t is an economic fact that this taxpayer received its moving expense money solely as a result of the condemnation and as a matter of state law. Its original property was actually converted by the condemnation into a sum (or sums) of money which the taxpayer utilized, concededly for qualified replacement property purchase. Economically and substantively, * * * this money received for moving expense was part of the "amount realized" on the conversion. But for the conversion it would not have been realized.

Id. at 487. See *Graphic Press, Inc.* v. *Commissioner,* 523 F.2d 585, 589 (9th Cir. 1975).

The Tax Court found that the decision in *Hitchcock* "compelled" it to hold that the disputed portion of petitioner's condemnation award "constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses" (Pet. App. 49a). Quite clearly, however, the Tax Court understood itself to be confronted only with the issue of how the disputed portion of petitioner's condemnation award "should be treated for purposes of Federal income taxation" (*id.* at 45a). Thus, in context, the Tax Court's statements that the condemnation award was not for "reimbursement of moving expenses" (*id.* at 49a, 53a; see *id.* at 52a) were simply restatements of the court's finding that the award could not be treated as ordinary income for federal income tax purposes. Nothing in the Tax Court's opinion or the Second Circuit's affirmance suggests that the tax decisions were intended to determine the characterization of the condemnation award under any other federal statute, including the Relocation Act.

Moreover, the Tax Court determined that the disputed portion of petitioner's condemnation payment was subject to nonrecognition of gain under section 1033 because it was made "solely as [the] result of" an involuntary conversion (Pet. App. 48a (quoting *Hitchcock*, 514 F.2d at 487)). In contrast, under the Relocation Act, the fact that a payment results from an involuntary conversion is entirely irrelevant to the issue of whether the payment has "substantially the same purpose and effect" as one for moving expenses within the meaning of 42 U.S.C. 4631.[1] Thus, the

[1] Indeed, Section 4631(b)'s bar to duplicate payments will almost always involve payments that would otherwise qualify as involuntary conversions under the federal tax code, since in order for the bar to attach, the section requires that the payment be "required by the State law of eminent domain."

Tax Court's holding does not preclude a finding that petitioner's award was for moving expenses within the meaning of the Relocation Act, because, as the district court correctly held, petitioner "may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money" (Pet. App. 19a (emphasis in original)).

Hence, the issue under the Relocation Act was not "in substance the same" as that resolved by the Tax Court; accordingly, HUD was not collaterally estopped from denying petitioner's claim. See *Montana* v. *United States,* 440 U.S. at 155.

2. Petitioner also argues that the agency and the lower courts did not adequately explain why the New York condemnation award should be considered to have the same purpose and effect as a payment for moving expenses under the Relocation Act (Pet. 21-24). This argument is wholly lacking in merit. The state supreme court (1) stated that the issue before it was to "determine the costs of disassembling, trucking, reassembling and relocation generally" (see Pet. App. 24a), (2) concluded that the payment fell into the category of expenses for "Moving, etc." (see *id.* at 18a), and (3) described the payment as comprised of the numerous specific expenses that would be entailed in moving petitioner's fixtures, including the costs of "motorization and electrical preparation of machines," "engineering," "pneumatic * * * water * * * [and] electrical disconnect and reconnect," "rigging and trucking," "moving raw materials, etc." and "realignment and rework" (see *id.* at 25a). In light of these findings, discussed in the decisions of HUD (see *id.* at 24a-26a) and the district court (see *id.* at 19a-21a), further extended explanation of the conclusion that the condemnation award

constituted reimbursement of petitioner's moving expenses was hardly necessary.[2]

---

[2] Contrary to petitioner's claim (Pet. 23-24), nothing in the decision below puts an enterprise that abandons its fixtures "in a substantially better position" than one that chooses to remove them. To the extent that New York condemnation law provides more money to an enterprise that abandons its fixtures than one that retains the fixtures and relocates them, the difference in condemnation awards simply reflects the fact that the displaced enterprise has retained the relocated fixtures and thus need not be compensated for the value of their use. Contrary to petitioner's claim, moreover, the value of their use to the dislocated enterprise is not necessarily a low "salvage value," but may instead approximate their in-place value at the original facility. Indeed, that is precisely why an enterprise would, as in this case, voluntarily choose the relocation option. Hence, rather than penalizing petitioner for relocating its fixtures, the lower courts in this case simply rejected petitioner's contention that Congress intended in the Relocation Act to subsidize relocation by paying petitioner for costs for which it had already received reimbursement. In any event, the facts of this case belie petitioner's contention that it has been undercompensated for its expenses. As the district court found (Pet. App. 21a), petitioner appears to have received a windfall under New York law, because its condemnation award was based on the contemplated expenses of moving its business to West Seneca, New York ($480,744.87), but petitioner actually moved its operations elsewhere in the City of Buffalo at a much lower cost ($279,266.85).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-52

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IN THE

Supreme Court of the United States

October Term, 1988

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing & Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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Question Presented

Whether Petitioner is Seeking a Double Recovery for Moving Expenses?

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Note: This Reply Brief is in response to both the Opposition Brief of United States Department of Housing and Urban Development, Samuel Pierce, as Secretary of the United States Department of Housing and Urban Renewal (hereinafter referred to as the Federal Respondents), and the Opposition Brief of Buffalo Urban Renewal Agency, City of Buffalo, James D. Griffin (hereinafter referred to as the City Respondents).

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REPLY BRIEF FOR PETITIONER

I.

Buffalo Wire Works does not seek a double recovery for moving expense.

The central contention of both the Federal Respondents and the City Respondents is clear, *i.e.*, that the Petitioner, Buffalo Wire Works (BWW), is attempting to be paid twice for its moving expenses. This is, and always has been, the only real issue in this case.

The Federal Respondents state that the "Question Presented" in this case is "Whether petitioner is entitled to payment for moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq., after having received such expenses in a New York condemnation proceeding.*" (Federal Brief, p. I). (Emphasis added).

The City Respondents state: "In a nutshell, what Petitioner seeks is a double recovery." (City Brief, p. 10.)

The reason for these statements is clear. Both are based on the contention that BWW already has received an award for moving expenses as part of the state condemnation award.

BWW's response is equally clear: *No part of the condemnation award represented a reimbursement of moving expenses.*

The basis of BWW's response is two-fold:

A.

In prior tax litigation the Tax Court of the United States and the Court of Appeals for the Second Circuit had already determined that no part of the state condemnation award constituted a reimbursement of prior moving expenses. Under settled law these holdings are binding on the United States, and its subordinate officials.

The Federal and City Respondents claim that the prior holdings of the Tax Court and the Second Circuit are not preclusive, on the ground that the issue in the tax case involved §1033 of the Internal Revenue Code and the issue here involves substantial equivalency under §4631(b) of the Relocation Act. This attempt to escape the *collateral estoppel* effect of the prior tax litigation should fail for several reasons:

First, this argument by the Respondents amounts to no more than saying that the *ultimate* question in the tax litigation was whether a portion of the state award should be included in income for tax purposes whereas the *ultimate* question in this case is whether BWW is entitled to a payment under the Relocation Act. *With this proposition BWW agrees.* However, what this argument does not (as it cannot) deny is that the *underlying issue* in this case is precisely the same as the *underlying issue* in the tax litigation, *i.e.*, whether, as a matter of New York law, any part of the state condemnation award constituted or represented a reimbursement for moving expenses. Put another way, the fact that the Tax Court made its determination "for purposes of Federal income taxation" is essentially irrelevant. What is relevant, as a matter of the law of collateral estoppel, is that in a determination necessary to its conclusion, the Tax court held that the nature and effect of the State condemnation award under New York law was in *no way* ("no part") a recovery of prior moving expenses. "[W]here the underlying issue in two suits is

the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit." *Lee v. F.T.C.*, 113 F.2d 583, 585 (8 Cir. 1940).

Moreover, the Respondents, especially the Federal Respondents, rely on the Second Circuit's prior opinion in *E. R. Hitchcock Co. v. United States*, 514 F.2d 484 (1975), for the proposition that nonrecognition under §1033 is not incompatible with BWW's having received a reimbursement for moving expenses. Even if this a fair reading of *Hitchcock*, it is irrelevant to the instant case for two reasons. First, Judge Gaffe in the Tax Court, in response to the Government's contention that *Hitchcock* was inapposite since it involved Connecticut law and not New York law, replied as follows:

> There is sufficient difference between the laws of Connecticut and New York to negate the applicability of *E. R. Hitchcock Co.*, to the facts of this case. Under Connecticut law, the fixing of a condemnation award is done upon the basis of the fair market value of the property. *Harvey Textile Co. v. Hill*, 135 Conn. 686, 689, 67 A.2d 851, 852 (1949). On the other hand, under New York law, the value of fixtures is determined as being the lower of two amounts: (1) the difference between their present value in place and their salvage value; and (2) the costs of disassembling, trucking, and reassembling the fixtures. *Rose v. New York*, 24 N.Y.2d 80, 246 N.E.2d 735 (1969). Whichever amount is used, *such amount becomes the value of fixtures* which are removed or could be removed. Thus, as under Connecticut law, compensation is made *from the value of the property taken.* New York law is not different from Connecticut law in that respect; it is simply more definite than Connecticut law in its use of moving expense data. Nevertheless, in both states the use of moving expenses is *as a measure of value*, and it is upon that basis that the court of appeals made its decision in *E. R. Hitchcock Co.* (Pet. App. 50a-51a.) (Emphasis added.)

Secondly, the Second Circuit in its unpublished opinion in the tax litigation *in this case* made it clear that under New York law the condemnation award did not represent a reimbursement for moving expenses, stating:

> "The $430,162 awarded the taxpayer by the City of Buffalo was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash. *E. R. Hitchcock Co. v. United States*, 514 F.2d 484, 487 (2d Cir. 1975). Under New York law this *method of valuation* may be adopted where it is smaller than the amount which would be arrived at by deducting salvage value from the present value of the fixtures in place, which in this case would have resulted in an award of $976,813. *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1968)". (Emphasis added.)

Finally both the Federal and the City Respondents have incorrectly characterized the tax case as involving only §1033 of the Code. As recited in BWW's Petition for Certiorari, pp. 11-12, the applicability of §1033 was only one of three theories upon which the Commissioner of Internal Revenue relied in the Tax Court. The other two were the "tax benefit theory" and the "right of reimbursement theory." Indeed, in its Reply Brief in the Second Circuit on the appeal of the tax case, the Government argued as follows:

> (1) the §1033 issue was "not before this Court";
>
> (2) "the deficiency asserted here was not based on the theory that the portion of the award reimbursing taxpayer's moving expenses was ineligible for treatment under Section 1033, but rather on the tax benefit rule, which requires taxpayer to restore to income the amount previously deducted as moving expenses and fully compensated by the condemnation award",

(3) "the presence of the tax benefit considerations distinguishes this case from Hitchcock, where the Court was simply not called upon to consider the tax benefit rule"; and

(4) the §1033 issue was "a phantom issue" and not "the crux of our case"

See Buffalo Wire Works v. Commissioner, 659 F.2d 1058 (2d Cir. 1981). (Reply Brief for the Appellant, pp. 1-2, attached as Appendix A.)

But, as Judge Goffe in the Tax Court accurately pointed out, all of the Government's theories, including the "tax benefit theory" (which is precisely the same as "double recovery" theory of the Respondents in this case)[1] were "premised on the same crucial determination,

---

[1] The Government's brief on appeal in the tax case used the language "double-dipped" (See Appendix A to this Reply Brief, at p. 4.) It should be noted that the City Respondents in their Opposition Brief accuse Petitioner of ignoring "another point" and of inferring on p. 21 of the Petition that the opposite of this other "point" is true. This other "point" is stated as follows: "The treatment, for tax purposes, of its condemnation award, under the Tax Court and Second Circuit rulings is identical to the tax treatment provided by the Act to moving expense awards: No payment received under [the Act] shall be considered as income for purposes of Title 26. 42 U.S.C. §4636."

It is difficult to know what the City Respondents think this other "point" is since they do not bother to explain it in their Brief. This is probably because the City Respondents are not quite sure how 42 U.S.C. §4636 fits into this case. The way it fits in is as follows: If, as a result of this Court's reversal of the decision below, BWW is paid moving expenses, the question then would arise whether such amounts would be includable in the gross income of BWW. There is no doubt that such amounts would be includable under the tax benefit rule. (That is what is inferred on p. 21 of the Petition). But the question would remain: Which should control? 42 U.S.C. §4636 or the tax benefit rule? Precisely the same type of question was decided by this court in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983). See Del Cotto and Joyce, *Double Benefits and Transactional Consistency Under the Tax Benefit Rule*, 39 Tax L. Rev. 473, 483, 489-90 (1984). (co-authored by co-counsel to Petitioner).

namely that a portion of the petitioner's condemnation award constituted reimbursement of moving expenses." (Pet. App. 45a). Directly in response to the "tax benefit theory" Judge Goffe held that "no part of that condemnation award constitutes a recovery of prior moving expenses." (Pet. App. 52a).

To state the collateral estoppel argument in a slightly different fashion,

> (1) if, as this Court held in *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983), the "tax benefit rule" requires an inclusion in income if a "later event is . . . fundamentally inconsistent with the premise on which the deduction was initially based", and
>
> (2) if, as the Tax Court and the Second Circuit held in the tax litigation, the state eminent domain award for BWW's fixtures was not "fundamentally inconsistent" with BWW's prior deduction for actual moving expenses, then
>
> (3) how can it seriously be contended that the same eminent domain award had "substantially the same purpose and effect" as a payment under the Relocation Act within the meaning of 42 U.S.C. §4631(b)?

B.

The holdings of the Tax Court and the Second Circuit in the tax litigation properly reflect the economic realities of this case. In the state condemnation award, BWW was compensated for the value created by its previous expenditures in moving its machinery to the old plant and making it an integral part of its business at the old plant. What BWW now claims is reimbursement for additional outlays made in moving the machinery an integral part of the new plant.

It is clear that a condemnor is required, under the law of eminent domain, to make just compensation for what it has taken, *but only for what it has taken.* That is why the City was required to compensate BWW for the in-place-value of its machinery fixtures even though BWW kept the machinery. It is also why the City *was not required* to pay for the cost of moving the fixtures to a new plant.

The Federal Government, however, *is required* to pay for the cost of moving machinery to a new plant because Congress has made that policy decision in the Relocation Act. The important point that must be kept in mind, as both the Tax Court and the Second Circuit recognized, is that this case involves *two sets of expenditures.* Firstly, there were the expenditures of moving the machinery to the old plant and integrating it with the land and building as part of a going operation. That is what the City paid for in the condemnation award.

Secondly, there were the distinct and additional expenditures of moving the machinery to the new plant and making it part of the going operation with the new land and buildings. BWW has never been paid for those expenditures, as the Tax Court and the Second Circuit have so held. It is reimbursement for these latter expenditures that BWW now seeks.

The failure of the Respondents to recognize the duality of BWW's expenditures is the reason for their erroneous view that BWW is seeking a double recovery. In this respect it bears repeating that this was precisely the same error which led the Commissioner of Internal Revenue to rely on the tax-benefit rule and the reimbursement rule in the tax litigation.[2]

This error also explains the failure of the City Respondents to understand how the Relocation Act distinguishes between payments for machinery that is moved and payments for machinery that is not moved. In its Opposition Brief, the City Respondents state:

> The Act is crystal clear that *even when fixtures are completely liquidated and left at the old facility, the maximum Federal relocation payment can never exceed the cost of moving those same fixtures.* 42 U.S.C. §4622(a)(2). How much more so, then, when fixtures are moved and kept by the same owner, should the relocation payment be capped at the cost of moving! (Brief, p. 17; emphasis in the original).

---

[2] Indeed this same mistake is behind the Federal Respondents failure to appreciate why "the decision below puts an enterprise that abandons its fixtures 'in a substantially better position' than one that chooses to remove them." See Footnote 2 of the Opposition Brief of the Federal Respondents. In that footnote it is asserted that "Contrary to petitioner's claim, moreover, the value of their use to the dislocated enterprise is not necessarily a low 'salvage value,' but may instead approximate their in-place value at the original facility."

What this assertion misses is the economic fact that fixtures retained from the old facility do not magically reappear at the new facility, in place and ready to operate. To put them in place and to "approximate their in-place value at the original facility" require the expenditure of money for "moving" including such things as "pneumatic" . . . water . . . [and] electrical . . . reconnect "rigging and trucking" etc. Here it cost BWW $295,773.24 to put these "salvaged" fixtures "in-place". That is what it seeks from the Federal Government under the Relocation Act.

The fatal flaw in this argument is fairly simple and straightforward. The Act provides for three types of payments:

> (a) the condemnee's actual expenses of moving a business, farm, or other personal property,
>
> (b) actual direct losses of tangible personal property in moving or discontinuing a farm or business, but no more than what it would have cost to relocate such property, and
>
> (c) search expenses.

The legislative history of the act makes it clear that the payment for direct losses of tangible personalty (which is limited by what it would cost to relocate such property), applies where the condemnee "is entitled to relocate his property . . . but does not do so." H. Rep. No. 91-1656, 92 Cong., 2d Sess. 1970 U.S. Cong. & Adm. News 5850, at 5855-5856. (It should be noted that this portion of the House Report is omitted from the recitation of the legislative history on p. 12 of the Opposition Brief of the City Respondents).

The argument that the same rule should apply to machinery that is moved (indeed the City Respondents argues that the rule applies *a fortiori*) misses the obvious fact that *if a condemnee does not move his fixtures, there are no actual moving expenses incurred and therefore there can obviously be no claim for "actual" moving expenses under the Act.* Equally obvious is the fact that if, as in our case, the condemnee does move its fixtures, *there are actual moving expenses and the Act requires that they be reimbursed.*

Conclusion

For these reasons, and for the reasons stated in the Petition, a writ of certiorari should issue to review the judgment of the Second Circuit.

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September 16, 1988

APPENDIX A

Reply Brief for the Appellant

80-4224

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

BUFFALO WIRE WORKS COMPANY, INC.,
Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant.

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT.

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IN THE
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-4224

BUFFALO WIRE WORKS COMPANY, INC.,
Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,
Appellant.

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT.

REPLY BRIEF FOR THE APPELLANT

Without repeating the arguments contained in our opening brief, we believe a response should be made to various contentions raised by the appellee, and this reply brief is directed to that end.

1. Appellee's first argument (Br. 9-16), that the reimbursement for moving expenses, in lieu of payment for the condemned fixtures, is ordinarily eligible for favorable treatment under Section 1033 of the Internal Revenue Code of 1954 (26 U.S.C.), addresses an issue not before this Court. The Court decided this issue in favor of the taxpayer in *E.R. Hitchcock Co. v. United States,* 514 F. 2d 484 (1975), aff'g 382 F. Supp. 236 (D. Conn. 1974), a decision that we are not contesting here, as

taxpayer acknowledges (Br. 21).[1] Rather, we [2] assert that *Hitchcock* does not dispose of this case, because the deficiency asserted here was not based on the theory that the portion of the award reimbursing taxpayer's moving expenses was ineligible for treatment under Section 1033, but rather on the tax benefit rule, which requires taxpayer to restore to income the amount previously deducted as moving expenses and full compensated by the condemnation award. It should be noted that taxpayer does not and, we believe, cannot controvert that the presence of tax benefit considerations distinguishes this case from Hitchcock, where the Court was simply not called upon to consider the tax benefit rule. Accordingly, taxpayer's lengthy first argument attacks a phantom issue, while avoiding the crux of our case.

2. Taxpayer's repeated assertions that the parties stipulated that it did not receive reimbursement for its *actual* moving costs (Br. 15 and 17) distorts the intent of the stipulation.[2] The Commissioner obviously did not mean that taxpayer was not, in fact, compensated for its prior moving expenses; had that been the case, there would have been no reason for issuing the notice of deficiency that occasioned taxpayer's petition to the Tax Court. The stipulation means nothing more than that the state court's judgment and award reflected estimated rather than actual moving expenses. This is not surprising, in view of the fact that it would not have been possible to ascertain [3] actual moving expenses at the time the award was fixed, because the move had not yet

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[1] "Br" references are to the appellee's brief.

[2] Taxpayer's brief incorrectly cites to p. 8 of the separately-bound appendix submitted with our opening brief. The applicable stipulation appears at page 11 of the appendix.

been completed. The move was not made until taxpayer accepted the award, and vacated the condemned property in preparation for transferring it to the condemnor. As a matter of fact, taxpayer incurred the bulk of the moving expenses in issue here after the award was fixed. Thus, the fact that the award was determined without reference to actual moving expenses is irrelevant to the question whether it was intended to reimburse such expenses.

3. Taxpayer argues, with numerous hypotheticals to illustrate the point (Br. 17, 18 and 25), that the concept of moving expenses entered into its condemnation award merely to measure the value of the condemned fixtures, and that, since it would have received the same amount whether or not it actually incurred the moving expenses, the amount cannot be considered as reimbursement for these expenses. This argument is unrealistic at best, and ignores the fact that state law characterization of an economic event cannot defeat the operation of a federal rule of law, like the tax benefit rule. *E.R. Hitchcock Co. v. United States, supra* at 485.

As taxpayer correctly points out (Br. 18), New York condemnation law offers the condemnee two choices: to remove the fixtures or to leave them in the condemned building, but awards the condemnee only an amount equal to the cost of the cheaper alternative, *i.e.*, moving costs or present in-place value less salvage value. In taxpayer's case, moving was less expensive, and this portion of the award was accordingly limited to estimated moving costs. Taxpayer, in fact, retained and moved its fixtures, deducting the expense of this move [4] and later receiving an amount exceeding its actual moving costs. There is no difference between taxpayer's actions and that of a condemnee who chooses not to move his fixtures, claims a loss deduction on their condemnation, and then receives full compensation for

the value of the condemned fixtures. By contrast, if taxpayer had abandoned or sold its fixtures, there would have been no moving expense deduction and no tax benefit (and no notice of deficiency to recover the tax benefit). Thus, contrary to taxpayer's assertion (Br. 22), there is no contradiction between extending Section 1033 treatment to an award for the condemnation of fixtures measured by the cost of removing them and requiring *this* taxpayer to restore to income amounts previously deducted as moving costs, which costs were later fully reimbursed by a condemnation award. Rather, the contradiction lies in taxpayer's attempt to treat the moving costs as an ordinary business expense for deduction purposes, but as part of a Section 1033 condemnation award for purposes of reporting its taxable income.

4. Taxpayer attempts to disguise the economic benefits it reaped from this inconsistency by refering to its investment of over $1 million, an amount in excess of its award, in replacement property, in addition to its payment of moving expenditures of $418,052 (Br. 23). Its ability to invest the entire award in replacement property, rather than merely the part in excess of the moving costs, however, supports our assertion that taxpayer "double-dipped," since one of the factors, if not the principal one, that [5] enabled taxpayer to upgrade its facility[3] was that it shared its moving expenses with the federal Government through their deduction, so that

[3] It cannot be denied that taxpayer did upgrade its facility by more than the $62,385 it spent in addition to its net award of $998,350. The taxpayer's facility at the time of condemnation was judged by the New York court as comprising land and buildings with fair market value of $635,000, plus the fixtures. After the condemnation, taxpayer had the same fixtures, plus land, buildings and fixtures it had acquired for $1,060,734, presumably representing their fair market value.

taxpayer's net (after-tax) moving expenses cannot have amounted to much more than $220,000, while the award reimbursed (on a pre-tax basis) more than $480,000, presumably leaving a comfortable surplus available for investment in replacement property.

[6] CONCLUSION

For the above reasons, as well as those set forth in our opening brief, the Tax Court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof to him on this _____ day of March, 1981, in an envelope, with postage prepaid, properly addressed to him as follows:

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